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Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

EMMANUEL D. KEPAS,
Plaintiff-Appellant-Petitioner,

—v.—

EBAY, INC.,
Defendant-Appellee-Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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March 2, 2011

QUESTIONS PRESENTED FOR REVIEW

1. The U.S. Tenth Circuit Court of Appeals' 2 - 1 Opinion ruled that if an employment arbitration agreement is determined to have an illegality, it is enforceable. The Opinion is in conflict with most courts with many in the Ninth Circuit that have ruled that if an arbitration agreement is determined to have an illegality, it is unenforceable. Given the conflict, the importance of the issue in general, and the impact to many, can the U.S. Supreme Court clarify the issue?

2. Is eBay a technology company, and entitled to the intellectual property carve-out, where they can sue an employee in Federal court, while the employee must use arbitration for claims against the company? A technology is defined as one that employs many individuals that develop their own inventions.

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OPINIONS BELOW

The opinions below are contained in the Appendices ("App.") to this Petition:

- The U.S. Tenth Circuit Court of Appeals December 2, 2010 Order denying the Petition for Rehearing is reproduced at Appendix A.
- The U.S. Tenth Circuit Court of Appeals November 2, 2010 Order and Judgment is reproduced at Appendix B.
- The American Arbitration Association (AAA) July 30, 2008 Opinion for Motion for Summary Judgment is reproduced at Appendix C.
- The U.S. District Court for the District of Utah, Central Division January 10, 2007 Order Compelling Arbitration and Staying Proceedings is reproduced at Appendix D.
- The Utah Labor Commission December 29, 2006 Opinion and Order is reproduced at Appendix E.
- The U.S. Equal Employment Opportunity Commission June 29, 2006 Notice of Right to Sue eBay is reproduced at Appendix F.

JURISDICTION

The U.S. Tenth Circuit Court of Appeals issued its Order in this case on December 2, 2010. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Federal Arbitration Act ("FAA")

Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e-2, as amended by the Civil Rights Act of 1991

Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(a)

STATEMENT OF THE CASE

The U.S. Tenth Circuit Court of Appeals' 2 - 1 Opinion ruled that if an employment arbitration agreement is determined to be illegal, it is enforceable. The Opinion is in conflict with most courts with many in the Ninth Circuit that have ruled that if an arbitration agreement is determined to be illegal, it is unenforceable. The U.S. District Court for the District of Utah, Central Division had attempted to heal the agreement by severing the offending provisions by blue lining, and then sent the case to arbitration that had only one arbitrator. The Equal Employment Opportunity Commission (EEOC) had ruled that the Petitioner has a right to sue eBay. The arbitrator essentially ruled the opposite of the EEOC, claiming a 300 day limitation, ignoring that the Petitioner had an employee action (promoted back in title, but not in pay grade - Appendix G). The Petitioner had filed a Motion for Default Judgment, because eBay altered evidence;

withheld evidence; and destroyed evidence. Even the arbitrator described eBay's document production as "dilatory." In addition, there is bribery to falsify testimony; harassment; sexual harassment; lying; and retaliation. See Appendix H, App. 106.

The term "illegal" as it pertains to employment arbitration agreements comes from the intent of the party with more power, the company (the employer). Intent can usually be a direct correlation of character. Character of companies usually is a direct correlation of its executives. Henry Gomez was a vice-president of eBay at the time that is related to this Petition. He later became the President of Skype, which was owned by eBay. He recently was the Campaign Manager for Meg Whitman. In testimony, an eBay Manager stated that Mr. Gomez was involved in insider trading (Appendix I, App. 112, highlighted. Bill Cobb was the president of eBay North America at that time. In testimony, an eBay Manager stated that Mr. Cobb was having sex with a subordinate, and that he had retaliated against the eBay Manager for speaking about the sex (Appendix I, App. 113, highlighted. The Petitioner's lawyer, Scott Crook, stated that the U.S. District Court for the District of Utah, Central Division Chief Judge (at the time), Dee Benson, had selected this case to preside over. Later, Mr. Crook stated that Chief Judge Benson, "Has been compromised." Furthermore, there is about one minute missing from the audio file in the hearing in the U.S. Tenth Circuit Court of Appeals.

ARGUMENT

BACKGROUND

The Petitioner, Emmanuel Kepas, is a 49 year old; father of six; grandfather of one; who has been married only once to the same woman for 27 years; and who was literally a boy scout (Eagle scout with a gold palm and member of the BSA Order of the Arrow), some if not a lot of which factor into why we are here.

Mr. Kepas was a vice-president for Morgan Stanley and held a supervisory license on the New York Stock Exchange, before working with eBay. Mr. Kepas' job with eBay encompassed but was not limited to communicating with executives of eBay throughout the world. Mr. Kepas was so competent and trusted that he had access to the primary software code and passwords of everyone in and on eBay. For example, he could have seen Meg Whitman's password if he wanted to. He never looked.

After a few years of meeting or exceeding eBay work expectations, Mr. Kepas was suddenly and unexpectedly demoted. His job was given to a 37 year old woman with very poor performance reviews. There are unsubstantiated rumors about this woman. Some include that she has "dirt" on something. She is "fire proof," and she has been paid a very significant amount of money.

The summary of what happened next was over a period of months. Many times, she harassed,

including sexually harassed, Mr. Kepas. EBay prides itself on its civil rights policy, which includes a complaint procedure. Over a period of time, Mr. Kepas informally complained, and then he formally complained when nothing had been done. He was then harassed by the process, including being falsely accused of things accompanied with the threat of being fired if he did not comply.

At the time Mr. Kepas was making $185,000 per year. EBay is significantly understaffed. As a result, he worked many additional hours. He had a highly visible and high pressure position as the eWatch Manger (the escalation manager of Customer Support of the whole world). Given the circumstances, Mr. Kepas experienced severe physical trauma, which included an extreme noise he describes as, "an electronic sound of brakes screeching." The medical term is tinnitus. He still is being treated for it. This condition is disabling and impairing as diagnosed by medical professionals. The medical professionals and the Utah Labor Commission (Emmanuel D. Kepas v. eBay, Inc. and/or American Home Assurance; Case No. 06-0439) concluded that the disability was caused by the physical trauma of discrimination, harassment, sexual harassment, false accusations, and retaliation. Due to the disability, Mr. Kepas' doctor had no choice other than to place him on medical sick leave. Due to the significant trauma, an eBay Human Resource Manager filed a claim for Worker Compensation. Then, eBay reversed their decision and opposed the claim. What this means is that the Utah Labor Commission coincides with the medical professionals that Mr. Kepas was injured by

discrimination, harassment, sexual harassment, false allegations, and retaliation. As a result, Mr. Kepas has an impairment rating of 75% of his previous wages. He has estimated to have earned less than $20,000 per year for the last three years. He has incurred legal fees in excess of $325,000, and secured those expenses with a lean on his house, which he stands in jeopardy of losing.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC)

As an employee of eBay, Mr. Kepas filed a discrimination claim with the EEOC that included but was not limited to harassment, sexual harassment, discrimination, age discrimination, and retaliation. The EEOC subsequently issued a Notice of Right to Sue (Appendix F). During the EEOC evaluation time, a company is not allowed to fire the complainant. However, eBay fired Mr. Kepas through their outside counsel who would not identify who authorized his termination. The Human Resource Director for Customer Support stated that Mr. Kepas could remain on unpaid sick leave pending the resolution of his claims.

ARBITRATION AGREEMENT

After being hired, eBay employees have a three month probationary period. Upon satisfactory completion, the employee is offered a fulltime position if they sign the arbitration agreement. Even though eBay mentions an agreement during the hiring phase, no details are given. The agreement was not readily accessible nor was it presented. The

new employee's focus is on successfully completing the 90 day probationary period not on the agreement. As a result, the agreement was a surprise; nonnegotiable; a contract of adhesion that lacks mutuality.

U.S. District Court for the District of Utah, Central Division
and
U.S. Tenth Circuit Court of Appeals

The predominate opinion of the courts for an employment arbitration agreement with defects is if there is more than one defect, the agreement is unenforceable and discarded. The eBay Arbitration Agreement has four. The Agreement is reproduced at Appendix J:

1. This includes, for example and without limiting the generality of the foregoing exclusion, claims by the Company that you have disclosed or misappropriated the Company's trade secrets and/or claims by you that you are the rightful owner of an invention.

   The Agreement here was substantively unconscionable because it does not have the "modicum of bilaterality" required to be enforceable, as eBay exempted from the Arbitration Agreement "claims that arise out of the Employee Proprietary Information and Inventions Agreement." eBay did not cite any case law to support its position. Rather, it argues that Kepas "misreads the *Mercuro* case" by not pointing out that the court found that the

arbitration agreement's exception for intellectual property disputes was not really bilateral because it only applied to claims that included a request for injunctive or other equitable relief, which would favor the employer. This argument is a red herring, however, as eBay ignores the clear language in *Martinez* that is directly relevant to this discussion: "claims involving trade secrets . . . typically are asserted only by employers." *Martinez v. Master Protection Corp.*, 118 Cal. App. 4th 107, 115 (Cal. Ct. App. 2004). In order for such an advantage for the employer to be conscionable, there must be a legitimate justification for it:

> As has been recognized "`unconscionability turns not only on a "one- sided" result, but also on an absence of "justification" for it.'" If the arbitration system established by the employer is indeed fair, then the employer as well as the employee should be willing to submit claims to arbitration. Without reasonable justification for this lack of mutuality, arbitration appears less as a forum for neutral dispute resolution and more as a means of maximizing employer advantage. Arbitration was not intended for this purpose.

Since California has recognized that trade secret claims are typically asserted by employers, eBay's unsubstantiated suggestion that its employees are more likely to claim an interest in their inventions than in other fields is not persuasive. Accordingly, the "carve-out" provision in the Agreement here is unconscionable. Moreover,

when an employer requires arbitration of those claims most likely to be brought by employees, but exempts claims that it is most likely to bring against employees, California courts find that this factor weighs in favor of invalidating the agreement. *See, e.g., Fitz v. NCR Corp.*, 13 Cal. Rptr. 3d 88, 105 (Cal. Ct. App. 2004).

2. The arbitration shall be conducted in Santa Clam County by a neutral arbitrator in accordance with the roles issued by the American Arbitration Association (AAA) for resolution of employment disputes, wherever this Agreement is silent on the arbitration procedure.

The Arbitration Agreement is a contract of adhesion because Mr. Kepas did not have an opportunity to negotiate its terms, so the fact that he had notice of the oppressive forum selection clause within the contract of adhesion does not make it less oppressive. Furthermore, Mr. Kepas did make a showing that the California forum selection clause would deprive him of his day of court. Since he argued before the district court that conducting the arbitration in California would cause him to incur significant costs to arbitrate this dispute in California

As a result, this forum provision serves only to provide eBay with a tactical advantage, requiring Mr, Kepas to absorb the costs of travel and accommodations in order to arbitrate his claims. If any witnesses did decide to testify [voluntarily, because they could not be subpoenaed], Mr. Kepas

would be required to pay their travel and accommodation expenses. Such costs would be substantial and may preclude Mr. Kepas from proceeding with arbitration. The district court agreed that the forum selection clause was "improper" and severed it.

3. The arbitrator shall have the power to award any type of legal or equitable relief that would be available in a court of competent jurisdiction including, but not limited to, the costs of arbitration, attorneys' fees and punitive damages when such damages and fees are available under the applicable statute and/or judicial authority.

   This agreement does not meet the requirement articulated in *Armendariz* that an arbitration agreement "not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum."

   Because this language indicates that an employee could be held responsible for paying all of the costs of arbitration, which may be significantly higher than the costs of court, this provision in the Agreement does not meet the *Armendariz* requirement.

   eBay responds that the "Agreement is not susceptible to Kepas' strained interpretation." This is not just Kepas' interpretation, however. The contract specifically states that the "Employer" will pay the arbitration costs in one paragraph, and then later states that the

arbitrator can order either party to pay the costs. As the district court noted, the "costs" are defined as "including the arbitrator's fees." When eBay's counsel stated in oral argument that "what this language I believe is intended to say is you as the employee under California law and under Armendariz can get everything in arbitration that you could get in a court of law," the district court responded, "Well that is what you want to say, but that is not necessarily what it says." The court went on to state that the language of the Agreement leaves open the possibility that an arbitrator "could make an award against the plaintiff, at the end of which the plaintiff is stuck with the arbitrator's fees. That is what they are worried about."

Regardless, the Agreement allows for the possibility that an employee could ultimately be held responsible for paying all of the costs of arbitration, to include the arbitrator's fees. "The mere inclusion of the costs provision in the arbitration agreement produces an unacceptable chilling effect," even if the employer later is willing to strike it. *Martinez v. Master Protection Corp.*, 12 Cal. Rptr. 3d 663, 671 (Cal. Ct. App. 2004). It is the perceived "*risk* that the claimant may have to bear substantial costs that deters the exercise of the constitutional right of due process." *Armendariz* at 764. Accordingly, the Agreement here does not meet the requirements of *Armendariz* because it allows for the possibility that the employee could have to pay arbitration costs and arbitrator's fees, which violates the

letter of *Armendariz* as well as its spirit, by acting as a deterrent to arbitration for the employee.

4. I understand that I would not be hired by the Employer if I did not sign this Agreement.

California case law is clear that when the language of a contract indicates that an arbitration clause is "a specific 'condition of employment,'" it is the employer's burden to show that the employee actually had some opportunity to negotiate. *Martinez* at 669. *Martinez* states: "An arbitration agreement that is an essential part of a 'take it or leave it' employment condition, without more, is procedurally unconscionable." The fact that the arbitration agreement was part of a take it or leave it conditions creates a presumption that the contract is procedurally unconscionable. The employer then has the burden to show that the agreement did not actually mean "take it or leave it," despite such appearances.

The court in *Armendariz* explained why arbitration agreements are required at the beginning of an employment relationship and are also contracts of adhesion. In the case of pre-employment arbitration contracts, the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement. *Armendariz* at 768; *see also, Martinez* at 669 (arbitration agreement

presented to employee as a prerequisite to employment was procedurally unconscionable).

The situation at issue here weigh even more in favor of a finding that the arbitration agreement was a contract of adhesion because at the time he was required to sign the Agreement, Mr. Kepas had already worked for eBay as a probationary employee, with the intention of becoming permanent. eBay seems to argue that the provision in the Agreement here that stated "I understand that I would not be hired by the Employer if I did not sign this Agreement" does not mean what it says because Kepas "was hired three months *before* he was even presented with the Agreement." This Argument is specious, however, given that it is undisputed that Kepas was a probationary employee up until the time he was presented with the Agreement. Without any evidence that the arbitration provision was up for negotiation, it is considered by California courts to be a contract of adhesion, and therefore, procedurally unconscionable.

THER IS NO CALIFORNIA PRECEDENT FOR SEVERING PROVISIONS IN AN AGREEMENT LIKE EBAY'S

The majority distinguishes certain case relied upon by Kepas, *Mercuro*, and *Fitz* in which California courts refused to enforce arbitration agreements that had carve-out provisions. Maj. Op. 16-17. It is important, however that there is no case law from California courts that provides precedent for the decision reached by the majority

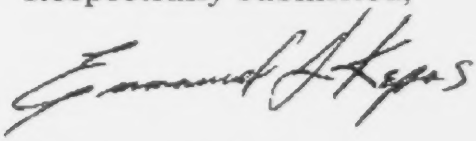
panel in this case. In *every* published decision from California in the employment context, where an arbitration agreement included a carve-out provision like the one in this case and at least one other defect, the court invalidated the agreement rather than sever it.

This reflects the strong policy argument articulated in *Armendariz* and its progeny, that "multiple defects indicate a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage." *Armendariz* at 775. In such cases of multiple defects, California cases have invariably invalidated the agreement at issue. While this might not be the approach the Tenth Circuit would generally take, the fact remains that under the law of California, which must be applied here, the only remedy determined to be appropriate when an arbitration agreement contains multiple defects (particularly when one is a lack of mutuality) is to invalidate the agreement.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should grant the Petition for Writ of Certiorari. The Petitioner requests that a default judgment be considered with a remand to the U.S. District Court for trial for the damages.

Respectfully submitted,



Dated: 3/2/11

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APPENDIX A

FILED December 2, 2010

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

EMMANUEL D. KEPAS,	:	
	:	
Plaintiff-Appellant,	:	No. 09-4200
	:	
v	:	
	:	
eBAY, a Delaware corporation,	:	
	:	
Defendant-Appellee.	:	

ORDER

Before **BRISCOE**, Chief Judge, **LUCERO** and **HOLMES**, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court,

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

APPENDIX B

FILED November 2, 2010

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

EMMANUEL D. KEPAS,	:	
	:	
Plaintiff-Appellant,	:	No. 09-4200
	:	
v	:	(D.C. No. 2:06-CV-00612-DB)
	:	
eBAY, a Delaware corporation,	:	(D. Utah)
	:	
	:	
Defendant-Appellee.	:	

ORDER AND JUDGMENT*

Before **BRISCOE**, Chief Judge, **LUCERO** and **HOLMES**, Circuit Judges.

This case involves a challenge by Emmanuel D. Kepas ("Kepas") to the enforceability of the

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

arbitration agreement ("Arbitration Agreement") existing between Kepas and his former employer, eBay ("eBay"). Kepas appeals the district court's order enforcing the Arbitration Agreement, compelling the arbitration of his claims, and staying Kepas's action against eBay. As Kepas pursued this appeal after the district court confirmed the arbitration award and dismissed his action against eBay, we exercise jurisdiction under 28 U.S.C. §1291. We affirm the district court's decision to compel arbitration.

I

Kepas filed this action against eBay in the United States District Court for the District of Utah alleging claims under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, and the Age Discrimination in Employment Act, as well as common law breach of contract and

breach of the covenant of good faith and fair dealing claims. App. at 4 (Compl. at 1). In response, eBay filed a motion to compel arbitration and dismiss or stay proceedings, arguing that the Arbitration Agreement covered Kepas's claims. Id. at 25.

In his Complaint, Kepas alleges that eBay, a Delaware corporation with its principal place of business in San Jose, California, operates a facility in Draper, Utah. Id. at 5 (Compl. at 2). Kepas further alleges that, subject to a probationary period, eBay hired Kepas to manage its Draper facility in July of 2003. Id. at 6-7 (Compl. at 3-4), 42. Kepas asserts that, upon the successful completion of his probationary period, eBay provided him with the Arbitration Agreement and conditioned his continued employment on his agreeing to the terms contained therein. Id. at 43. Kepas signed the Arbitration Agreement on November 7, 2003. See id.

The Arbitration Agreement, which appears on eBay letterhead and is typewritten on two pages, specifies the following details concerning its scope:

> The parties to this Agreement agree to arbitrate any dispute, demand, claim, or controversy ("claim") they may have against each other . . . which arises from the employment relationship between Employee and Employer or the termination thereof. Claims covered by this Agreement include, but are not limited to, claims of employment discrimination and harassment under Title VII of the Civil Rights Act, as amended, . . . the Age Discrimination in Employment Act, as amended, . . . breach of employment contract or the implied covenant of good faith and fair dealing, express or implied; wrongful termination in violation of public policy . . . .
>
> The parties agree that any claims that either party has that arise out of the Employee Proprietary Information and Inventions Agreement are specifically excluded from this Agreement. This includes, for example and without limiting the generality of the foregoing exclusion, claims by the Company that you have disclosed or misappropriated the Company's trade secrets and/or claims by you that you are the rightful owner of an invention.

Id. at 59-60.

Further, the Arbitration Agreement includes the following forum selection clause and choice-of-law provision:

> The arbitration shall be conducted in Santa Clara County . . . in accordance with the rules issued by the American Arbitration Association ("AAA") for resolution of employment disputes, wherever this Agreement is silent on the arbitration procedure. . . .
>
> . . . .
>
> This Agreement shall be governed by and shall be interpreted in accordance with the laws of the State of California. . . .

Id.

The Arbitration Agreement includes the following provisions concerning the arbitration expenses and the types of awards that could be granted in arbitration:

> The Employer will pay the arbitrator's fee for the proceeding, as well as any room or other charges by AAA. . . .

. . . .

> The arbitrator shall have the power to award any type of legal or equitable relief that would be available in a court of competent jurisdiction including, but not limited to, the costs of arbitration, attorneys' fees and punitive damages when such damages and fees are available under the applicable statute and/or judicial authority. . . .

Id. (emphasis added). "Costs of arbitration" is then defined in the AAA Rules and Mediation Procedures as: "[a]ll expenses of the arbitrator . . . and any AAA expenses, as well as the costs relating to proof and witnesses produced at the direction of the arbitrator." Id. at 62-63.

Finally, the Arbitration Agreement requires the following attestations by the employee: "I understand that I would not be hired by the Employer if I did not sign this Agreement. . . . I have been advised of my right to consult with counsel regarding this Agreement." Id.

When Kepas filed the present action, eBay responded with a motion to compel arbitration and stay or dismiss proceedings. Kepas opposed eBay's motion, asserting that the Arbitration Agreement was unenforceable. Id. at 41-42. After conducting a hearing, the district court compelled the arbitration of Kepas's claims and stayed the proceedings against eBay, provided that certain conditions were satisfied. Id. at 81-82. Specifically, the district court required that "eBay agree[] that the arbitrator(s) selected in this case shall have no authority to award eBay arbitrator fees or the costs associated with room or other facility rental for the arbitration hearing" and explained that "[t]he arbitrator(s) may award to eBay only those costs that could be awarded in a proceeding under the Federal Rules of Civil Procedure or the Local Rules of the Utah Federal District Court." Id. Further, the district court

modified the Arbitration Agreement to permit "the arbitration hearing to occur in Santa Clara County, California or in Salt Lake County, Utah, at the Plaintiff's election." Id. at 82. After the court compelled arbitration, Kepas chose to pursue his claims in arbitration in Utah. See id. at 120. The arbitrator ultimately entered an Order on Summary Judgment dismissing each of Kepas's claims with prejudice. Id. at 93-108. The district court then confirmed the arbitrator's decision and dismissed Kepas's action against eBay. Id. at 153-54. Kepas now appeals the district court's decision to compel arbitration, arguing that the Arbitration Agreement, as written, is unenforceable.

II

"We review a district court's grant or denial of a motion to compel arbitration de novo, applying the same legal standard employed by the district court."

Armijo v. Prudential Ins. Co. of Am., 72 F.3d 793, 796 (10th Cir. 1995). The parties agree that California law applies to this dispute. See also Engalla v. Permanente Med. Group, Inc., 938 P.2d 903, 915 (Cal. 1997) (reasoning that, as the arbitration agreement had an express choice-of-law provision, California law governed a dispute regarding the agreement's enforceability). "California law incorporates many of the basic policy objectives contained in the Federal Arbitration Act [("FAA")], including a presumption in favor of arbitrability." Id. Similar to the FAA, the California Arbitration Act ("CAA") holds arbitration agreements "valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract." Cal. Civ. Proc. Code § 1281. Thus, enforceability of an arbitration agreement is assessed using the same

"state law standards that apply to contracts in general." Engalla, 938 P.2d at 915.

On appeal, Kepas identifies the following deficiencies in the Arbitration Agreement: (1) the Arbitration Agreement fails to satisfy the minimum requirements established in Armendariz v. Foundation Health Psychare Svcs., Inc., 6 P.3d 669 (Cal. 2000); and (2) the Arbitration Agreement is unconscionable. Further, he contends that these defects render the agreement unenforceable in its entirety. Thus, Kepas argues that the district court erred in enforcing the Arbitration Agreement. We will examine each alleged defect separately and then determine whether the agreement is enforceable.

A. Armendariz Minimum Requirements

In Armendariz, the California Supreme Court established minimum standards for employer-mandated arbitration agreements that require

employees to waive their statutory rights. 6 P.3d at 682. Specifically, such arbitration agreements must:

> (1) [P]rovide[] for neutral arbitrators, (2) provide[] for more than minimal discovery; (3) require[] a written award, (4) provide[] for all of the types of relief that would otherwise be available in court, and (5) . . . not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum.

Id. at 682 & n.8 (quoting Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1482 (D.C. Cir. 1997)). An arbitration agreement that fails to satisfy these minimum requirements contravenes public policy. See Armendariz, 6 P.3d at 674. As eBay required that Kepas execute an arbitration agreement that waived his statutory rights pursuant to Title VII and the Age Discrimination in Employment Act, the parties agree that the minimum requirements of Armendariz apply to the Arbitration Agreement. See id. at 680-81 (concluding that the minimum

requirements of Cole extend beyond the context of Title VII).

Pursuant to the requirement that employees not bear unreasonable costs or arbitrator fees, Armendariz explains that "the employee [cannot be required] to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court." Id. at 687 (emphasis in original). Rather, "the employer [must] pay all types of costs that are unique to arbitration." Id. at 689. Kepas alleges that the Arbitration Agreement impermissibly exposes him to arbitration expenses and to unreasonable witness travel costs.

1. Arbitration Costs

Kepas asserts that the Arbitration Agreement violates Armendariz because arbitrator fees and American Arbitration Association ("AAA") costs could

be imposed on employees pursuant to the arbitrator's award. We agree.

The Arbitration Agreement expressly allows an arbitrator to award "any type of legal or equitable relief that would be available in a court of competent jurisdiction, including but not limited to, the costs of arbitration." App. at 59-60 (emphasis added). As the term "costs of arbitration" is undefined in the Arbitration Agreement, we look to the AAA Rules and Procedures for its meaning. See id. at 59 (requiring that, "wherever this Agreement is silent on the arbitration procedure," the rules issued by the AAA control). The AAA Rules and Procedures define the term "costs of arbitration" as "[a]ll expenses of the arbitrator . . . and any AAA expenses." Id. at 63. Thus, we conclude that the Arbitration Agreement impermissibly imposes a significant risk of these costs on employees.

eBay's arguments to the contrary are unavailing. First, eBay points to a provision in the Arbitration Agreement specifying that "the Employer will pay the arbitrator's fee for the proceeding, as well as any room or other charges by AAA." Id. at 59. However, this provision merely suggests that eBay will cover these costs initially. The employee nonetheless faces the risk that the arbitrator could shift the costs to him or her in the arbitration award. As a cost-shifting "system . . . poses a significant risk that employees will have to bear large costs to vindicate their statutory right against workplace discrimination," this provision contravenes public policy pursuant to Armendariz. Mercuro v. Superior Court, 116 Cal. Rptr. 2d 671, 681-82 (Cal. Ct. App. 2002) (internal quotation marks omitted).

Second, eBay asserts that the arbitrator has no ability to require the employee to pay arbitrator

fees and other AAA expenses, as such relief would be unavailable "in a court of competent jurisdiction." App. at 59-60. This argument ignores the language set forth in the Arbitration Agreement. The arbitrator is explicitly authorized by the Arbitration Agreement to impose the "costs of arbitration" on an employee. Id. at 60. Further, adopting eBay's explanation would render the term "costs of arbitration" in the award provision inoperative and, pursuant to the California rules of contract interpretation, such result should be avoided. See Cal. Civ. Code § 1641 (specifying that, when interpreting the language of a contract, the court should give effect to every provision). As we have concluded that the award provision contravenes public policy, we must also evaluate whether the defect renders the Arbitration Agreement unenforceable in its entirety or whether this

provision is severable. After addressing other alleged defects in the Arbitration Agreement, we will turn to the issue of severability.

2. Witness Expenses

Kepas argues that the requirements set forth in Armendariz are also violated by the forum selection clause's effect on witness travel expenses. He asserts that the forum selection clause in the Arbitration Agreement could require employees to incur unreasonable witness travel expenses in order for their witnesses to travel to distant arbitration proceedings. Specifically, he argues that the forum selection clause mandates that the arbitration proceedings for covered claims occur in Santa Clara County, California, while his relevant witnesses are located in Utah.

As witness travel costs are not unique to arbitration, Kepas's challenge to the forum selection

clause and its related effect on witness travel expenses is not compelling. In fact, courts consider these costs when evaluating the reasonableness of forum selection clauses in conjunction with litigation in general. See Smith, Valentino & Smith, Inc. v. Superior Court, 551 P.2d 1206, 1209 (Cal. 1976). Thus, an employee's potential to incur witness travel costs does not violate the Armendariz minimum requirements. Rather, Kepas's argument implicates the reasonableness of the forum selection clause itself, which we will also address.

B. Unconscionability

Pursuant to California law, courts may refuse to enforce unconscionable contracts. Cal. Civ. Code § 1670.5. Thus, arbitration agreements can be challenged based on unconscionability. See Cal. Civ. Proc. Code § 1281. In California, unconscionability requires evidence of both procedural and substantive

elements. Armendariz, 6 P.3d at 690. However, these components "need not be present in the same degree." Id. Rather, "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." Id.

Kepas contends that the clauses delineating the scope of the Arbitration Agreement, as well as the forum selection clause, are unconscionable.

1. Procedural Unconscionability

"Procedural unconscionability concerns the manner in which the contract was negotiated and the circumstances of the parties at that time." Parada v. Superior Court, 98 Cal. Rptr. 3d 743, 756 (Cal. Ct. App. 2009) (internal quotation marks omitted). When evaluating contracts for procedural unconscionability, California courts consider: (1)

whether the agreement is an adhesion contract; (2) whether oppression played a role in execution of the agreement; and (3) whether a party was surprised by the agreement's hidden terms. See id. at 756-57. Courts then balance the presence or absence of each factor. See id. at 758.

An adhesion contract is defined as "a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." Armendariz, 6 P.3d at 689 (internal quotation marks omitted). The Arbitration Agreement is clearly an adhesion contract. It is a standardized agreement that eBay, the party with superior bargaining power, drafted and provided to Kepas. Further, eBay required that Kepas complete the agreement at the end of his probationary period, and the express

language of the agreement conditions Kepas's continued employment on his acceptance of its terms.

Nonetheless, our concluding that the Arbitration Agreement is an adhesion contract does not end the procedural unconscionability analysis. Parada, 98 Cal. Rptr. 3d at 757. We must proceed to the remaining factors. Id. "Oppression" refers to the "absence of power to negotiate the terms of the contract" as well as the "absence of reasonable market alternatives." Id. at 758 (internal quotation marks omitted). Despite the fact that the Arbitration Agreement permitted Kepas to consult with an attorney regarding its terms, most employees are not "in a position to refuse a job because of an arbitration requirement," Armendariz, 6 P.3d at 690, even under the advice of counsel. eBay contends that Kepas was already an employee at the time he entered the Arbitration Agreement,

and thus, he was in a position to negotiate the terms of the Arbitration Agreement. However, this argument is unpersuasive as eBay required Kepas to enter the agreement when he completed his probationary employment period. As a result, Kepas could reasonably have concluded that he had to execute the Arbitration Agreement in order to continue his employment with eBay by becoming a permanent eBay employee.

"Surprise" addresses "whether the challenged term is hidden in a prolix printed form or is otherwise beyond the reasonable expectation of the weaker party." Parada, 98 Cal. Rptr. 3d at 757 (internal quotation marks omitted). The Arbitration Agreement lacks the element of surprise. Specifically, the Arbitration Agreement was typewritten on two pages. Further, the challenged terms were not beyond Kepas's reasonable

expectations. As eBay is headquartered in California, a forum selection clause selecting California as the arbitration forum could reasonably be expected. Additionally, the claims governed by the Arbitration Agreement, as well as those claims excluded from arbitration, were clearly identified.

Thus, we conclude that procedural unconscionability is present. However, the degree of procedural unconscionability is reduced due to the lack of surprise.

2. Substantive Unconscionability

"A provision is substantively unconscionable if it involves contract terms that are so one-sided as to shock the conscience, or that [are] . . . harsh or oppressive . . . ." Id. at 759 (internal quotation marks omitted). Kepas asserts two arguments for substantive unconscionability. First, he argues that the Arbitration Agreement lacks mutuality. Second,

he argues that the forum selection clause is unreasonably oppressive to employees.

a. Mutuality

Pursuant to California law, arbitration agreements are substantively unconscionable when they lack a "modicum of bilaterality." Armendariz, 6 P.3d at 692 (internal quotation marks omitted). Such one-sidedness exists when arbitration agreements "compel[] arbitration of the claims more likely to be brought by the weaker party, but exempt[] from arbitration the types of claims that are more likely to be brought by the stronger party." Fitz v. NCR Corp., 13 Cal. Rptr. 3d 88, 104 (Cal. Ct. App. 2004) (citing Armendariz, 6 P.3d at 692). Further, lack of mutuality exists when employees are required to pursue arbitration for claims arising out of the same transaction or occurrence that the employer can litigate. See Fitz, 13 Cal. Rptr. 3d at

105. Nevertheless, courts uphold arbitration agreements lacking mutuality if the employer can present a reasonable business justification for the one-sidedness of the agreement. See Armendariz, 6 P.3d at 692.

We conclude the Arbitration Agreement is sufficiently bilateral based on its plain language. Specifically, the Arbitration Agreement broadly applies to all claims the parties have against one another arising from the employment relationship. See App. at 59. The Arbitration Agreement then expressly excludes from arbitration the claims "that either party has that arise out of the Employee Proprietary Information and Inventions Agreement." Id. As the exclusion from arbitration applies to all claims "arising out of" the Employee Proprietary Information and Inventions Agreement, the employee would be able to pursue litigation for all

conduct arising from the same transaction or occurrence that the employer can litigate. For example, per the Arbitration Agreement, an employee terminated for stealing trade secrets could litigate an accompanying wrongful termination claim, as this claim would arise out of the Employee Proprietary Information and Inventions Agreement. Cf. Armendariz, 6 P.3d at 694 (concluding that the agreement lacked mutuality on this basis).

Kepas contends that the Arbitration Agreement lacks mutuality by requiring employees to arbitrate the claims that they are likely to pursue, while eBay can litigate its likely claims. As the party challenging the agreement, Kepas has the burden to adequately support this contention. See Arguelles-Romero v. Superior Court, 109 Cal. Rptr. 3d 289, 305 (Cal. Ct. App. 2010) (specifying that "[i]t is the plaintiff's burden to introduce sufficient evidence to

establish unconscionability."). However, Kepas fails to identify the types of claims excluded from arbitration pursuant to the Employee Proprietary Information and Inventions Agreement. Instead, Kepas merely asserts that these claims are more likely to be brought by the employer.

Further, the cases that Kepas cites to support the contention that the Arbitration Agreement lacks mutuality are distinguishable. Specifically, in Mercuro, the court concluded that an arbitration agreement was substantively unconscionable because it specifically covered claims "for breach of express or implied contracts or covenants, tort claims, claims of discrimination . . . and claims for violation" of any law, while it excluded from arbitration "claims for injunctive and/or equitable relief" for any intellectual property violations. 116 Cal. Rptr. 2d at 677 (internal quotation marks omitted). The court

concluded that the "agreement compel[led] arbitration of the claims employees are most likely to bring against" the employer, and exempted from arbitration the claims the employer "is most likely to bring against its employees." Id. While the plain language of the agreement excluded from arbitration both employee and employer intellectual property claims, it effectively only allowed litigation of the employer's claims as employees would generally not seek injunctive or equitable relief. See id. In contrast, the arbitration agreement at issue applies to all employment-related claims and excludes from arbitration both employer and employee claims regardless of the relief sought.

Nonetheless, in Fitz, the court concluded that an agreement covering "most workplace concerns," while excluding from arbitration "disputes over confidentiality / non-compete agreements or

intellectual property rights" lacked mutuality. 13 Cal. Rptr. 3d at 92, 104-05 & n.6 (internal quotation marks omitted). The court determined that this agreement included the claims that employees would most likely pursue against the employer, and excluded from arbitration the claims the employer would most likely bring against the employee. Id. at 104-05. While the agreement in Fitz is more analogous to the arbitration agreement at issue, a key distinction is present in this case because of the unique industry in which eBay operates. As a technology company, eBay employs many individuals that develop their own inventions. Thus, the provision excluding from arbitration the claims "that either party has that arise out of the Employee Proprietary Information and Inventions Agreement" is likely to be used by employees as well as eBay.[1]

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[1] The dissent concludes that Fitz controls the outcome of

App. at 59. While Kepas correctly argues that employers have the burden to establish their asserted business justifications for one-sided arbitration agreements, see Mercuro, 116 Cal. Rptr. 2d at 678 (citing Armendariz, 6 P.3d at 692), the argument in this context is misplaced. eBay's industry is not used here to justify a one-sided arbitration agreement, but rather to determine whether its employees are more likely to also pursue the claims excluded from arbitration. Thus, we conclude that the claims excluded from arbitration

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this case as the employer in Fitz was also a "technology company." (Dissent at 1). However, in Fitz, rather than arguing that employees were more likely to bring intellectual property claims based on its industry, the employer merely "cite[d] cases where employees ha[d] filed actions against employers over noncompete agreements and intellectual property claims" to support the conclusion that the agreement at issue was sufficiently bilateral. Fitz, 13 Cal. Rptr. 3d at 104. In contrast, eBay contends that employees are likely to pursue the claims excluded from the Arbitration Agreement based on the industry in which it operates. Thus, we conclude that the distinction based on eBay's industry is not precluded by Fitz.

are likely to be pursued by both parties, rendering the Arbitration Agreement sufficiently bilateral.

b. Forum Selection Clause

"[F]orum selection clauses are given effect . . . absent a showing that enforcement would be unfair or unreasonable." Furda v. Superior Court, 207 Cal. Rptr. 646, 650 (Cal. Ct. App. 1984). Courts "place a heavy burden on the plaintiff who seeks to prove that a forum selection clause is unreasonable, particularly where the alleged unreasonableness is based on additional expense and inconvenience of litigating far from home." Aral v. Earthlink, Inc., 36 Cal. Rptr. 3d 229, 241 (Cal. Ct. App. 2005). Nevertheless, this burden is not insurmountable. Id. The party challenging the forum selection clause must show that requiring proceedings in the "'contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day

in court.'" Id. at 241-42 (quoting M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 18 (1972)). Alternatively, the challenging party must show that there is "no rational basis . . . for the choice of forum." Intershop Commc'ns v. Superior Court, 127 Cal. Rptr. 2d 847, 853 (Cal. Ct. App. 2002).

Kepas fails to satisfy this heavy burden. While he argues that the forum selection clause imposes additional expenses and potentially impairs his ability to secure the presence of witnesses, Kepas does not show that these issues would effectively preclude him from asserting his claims. Thus, this case is distinguishable from Bolter v. Superior Court, 104 Cal. Rptr. 2d 888 (Cal. Ct. App. 2001). In Bolter, the court concluded that requiring the plaintiffs to pursue their claims in a distant forum essentially deprived them of their day in court based on the circumstances. See id. at 895. Specifically, the court

noted that the plaintiffs were "Mom-and-Pop franchisees" operating one-person stores and they would have to "close down their shops, pay for airfare and accommodations . . . and absorb the increased costs associated in having counsel familiar with Utah law" to pursue their claims. Id. at 894. Further, the plaintiffs declared that "they are all suffering from severe financial hardships and could not afford to maintain their claims if forced to litigate the matter out of state." Id. at 895. The arbitration agreement also deprived the plaintiffs of the ability to consolidate their claims to spread these increased costs. Id. at 894. Kepas's assertions regarding additional expenses do not rise to the level of hardships faced by the plaintiffs in Bolter.

Additionally, some of the hardships which allegedly arise from the forum selection clause are illusory. Specifically, he suggests that he would be

unable to secure the presence of his Utah witnesses in California. While the California subpoena power is limited to residents of California, see Cal. Civ. Proc. Code § 1989, Kepas could nevertheless obtain the testimony of his Utah witnesses by deposing them in Utah. Further, Kepas cites witness travel costs as a hardship. However, rather than incur travel costs for his witnesses, Kepas could use their deposition testimony. See Smith, 551 P.2d at 1209.

Finally, there is a reasonable connection between the cause of action and the forum selected. Specifically, eBay's principal place of business is California. See Lu v. Dryclean-U.S.A. of Cal., Inc., 14 Cal. Rptr. 2d 906, 908 n.2 (Cal. Ct. App. 1992) (noting that a party's principal place of business evidences a relationship to the forum). Thus, as the forum selected does not preclude Kepas from asserting his claims and is rationally related to the

cause of action, the forum selection provision is not substantively unconscionable.[2]

C. Severability

Based on the foregoing analysis, the sole defect in the Arbitration Agreement is the potential for the arbitrator to impose the "costs of arbitration" on the employee. Thus, we must consider whether the objectionable term is severable, or whether it renders the entire Arbitration Agreement unenforceable. We conclude that this provision is severable.

"Arbitration agreements that fail to meet conscionability standards, or those that violate public policy, nevertheless may be enforced if the objectionable terms can be severed." Abramson v. Juniper Networks, Inc., 9 Cal. Rptr. 3d 422, 437 (Cal.

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[2] The district court ultimately modified this provision and the arbitration proceedings were conducted in Utah. App. at 81-82, 93.

Ct. App. 2004). To evaluate the severability of an unlawful provision, the "overarching inquiry" is whether severance would further "the interests of justice." Armendariz, 6 P.3d at 696 (internal quotation marks omitted). To that end, California courts weigh several factors. Abramson, 9 Cal. Rptr. 3d at 438- 39. First, courts consider the essential object of the agreement to determine whether the illegality is collateral to the main purpose. Id. at 438 (citing Armendariz, 6 P.3d at 696). Second, courts consider whether the agreement contains more than one objectionable term to assess the pervasiveness of the illegality. Abramson, 9 Cal. Rptr. 3d at 438-39 (citing Armendariz, 6 P.3d at 697). Finally, courts evaluate whether there is a single provision that a court can strike or otherwise restrict to remove the illegality from the agreement. Abramson, 9 Cal.

Rptr. 3d at 438-39 (citing Armendariz, 6 P.3d at 696-97).

While not explicitly stated in the agreement, we conclude that the Arbitration Agreement's primary purpose is "to provide a mechanism to resolve disputes." Gutierrez v. Autowest, Inc., 7 Cal. Rptr. 3d 267, 280 (Cal. Ct. App. 2003) (finding the imposition of substantial arbitration costs as collateral to the main purpose of the arbitration agreement at issue). Thus, the provision allowing the arbitrator to impose the "costs of arbitration" on the employee is collateral to this central purpose. Further, the only objectionable provision in the Arbitration Agreement is this award provision. Thus, the illegality is not pervasive and the Arbitration Agreement does not represent a systematic effort to deprive employees of their rights. Finally, by excising the "costs of arbitration" term

from the award provision, the deficiency in the Arbitration Agreement can be easily rectified. Thus, this objectionable term is severable and the remainder of the Arbitration Agreement is enforceable.

The district court properly restricted the meaning of the award provision and compelled arbitration. We therefore affirm the district court's decision.

Entered for the Court

Mary Beck Briscoe
Chief Judge

Kepas v. eBay, 09-4200

LUCERO, J., dissenting.

I respectfully dissent. Contrary to the majority's holding, the Arbitration Agreement lacks mutuality, and is therefore substantively unconscionable. See Fitz v. NCR Corp., 13 Cal. Rptr. 3d 88, 103 (Ct. App. 2004) ("In assessing substantive unconscionability, the paramount consideration is mutuality."). As with the unconscionable agreement in Fitz, the Arbitration Agreement exempts claims related to intellectual property—those claims recognized by Fitz as more likely to be brought by the employer, rather than employees. However, the majority holds that this carve-out is not unilateral and distinguishes the instant case from Fitz on the grounds that eBay, unlike NCR, is a "technology company" which "employs many individuals that develop their own inventions." (Majority Op. 16.)

What the majority fails to recognize is that the employer in Fitz, NCR or National Cash Register Corporation, is also a "technology company" and this fact was before the Fitz court.[1] Moreover, the California Court of Appeal in Fitz, rejected an almost identical argument from NCR. The company cited cases in which employees brought suit over intellectual property claims. Nonetheless, the court held that the exemption for intellectual property

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[1] Brief of Defendant-Appellant at 26, Fitz v. NCR Corp., No. D041738 (Cal. Ct. App., July 1, 2003) ("NCR, formerly known as National Cash Register Company, is a technology company."). See also, NCR, Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, http://www.sec.gov/Archives/edgar/data/70866/000119312510041121/d10k.htm (last visited Oct. 22, 2010) ("NCR Corporation and its subsidiaries . . . provide technology and services . . ."). NCR developed the first electric cash register, one of the first ATMs, early computers, invented the liquid crystal display and commercialized the bar code scanner. NCR History, NCR, http://www.ncr.com/about_ncr/company_overview/history.jsp (last visited Oct. 22, 2010). NCR is not alone in its contention that it is, in fact, a technology company. The Atlanta Journal-Constitution described the company as a "[t]echnology giant." J. Scott Trubey, NCR Profit Soars in the Third Quarter, Atlanta J.-Const., Oct. 21, 2010, available at http://www.ajc.com/business/ncr-profit-soars-in-687569.html.

claims lacked mutuality because "it is far more often the case that employers, not employees, will file such claims." Fitz, 13 Cal. Rptr. 3d at 104. Fitz is clear: The fact that an employer is a technology company and that some employees might advance intellectual property claims does not render an intellectual property carve-out mutual. Fitz governs this case, and the exemption is therefore unconscionable.

I also disagree with the majority on the issue of remedy for the defective provisions of the Arbitration Agreement. Because I would hold the intellectual property exemption unconscionable, the district court's failure to strike this provision renders its severance remedy inadequate. Invalidation of the Arbitration Agreement in its entirety vindicates California's policy objective of deterring employers from "routinely inserting such a deliberately illegal clause into the arbitration agreement it mandates for

its employees." Armendariz v. Found. Health Psychcare Serv., Inc., 6 P.3d 669, 697 n.13 (Cal. 2000). Otherwise—as in this case—"employers are encouraged to overreach; if the covenant they draft is overbroad then the court will redraft it for them." Id.

For the foregoing reasons, I respectfully **DISSENT**.

APPENDIX C

AMERICAN ARBITRATION ASSOCIATION

EMMANUEL D. KEPAS,	**ORDER ON**
	SUMMARY
Claimant,	**JUDGMENT**
vs.	Case No. 77 160 00465 06 DECR
EBAY, INC., a Delaware Corporation,	Arbitrator: Theresa L. Corrada
Respondent,	

This matter comes before the Arbitrator upon Respondent eBay's Motion for Summary Judgment. The parties have fully and thoroughly briefed the legal issues and have submitted numerous exhibits, deposition excerpts, and affidavits. In addition, a live oral argument, lasting approximately 3 1/2 hours was held in Salt Lake City on July 14, 2008, in which both parties were given ample opportunity to present their arguments, counter-arguments and pertinent evidence. Being fully advised by the parties, and having spent considerable time studying the applicable law and all of the materials, my rulings are as follows.

I. LEGAL STANDARD APPLIED

The parties agree that the standard to be applied is set forth in Fed. R. Civ. P. 56I and case law interpreting that rule. Specifically, summary judgment should be granted only if there is no genuine issue as to any material fact and eBay is entitled to judgment as a matter of law. In deciding whether there are issues of material fact, I must draw all *reasonable* inferences from the evidence in favor of Mr. Kepas. To survive summary judgment, the evidence supporting Kepas's claims cannot be merely "colorable"; it must be significantly probative, to the extent that a reasonable factfinder could find in Mr. Kepas's favor on the claim. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,252 (1986); *Comm. For First Amendment v. Campbell*, 962 F.2d 1517, 1521 (10th Cir. 1992).

II. AGE DISCRIMINATION CLAIMS

A. Mr. Kepas's Allegations

In his Notice of Intent to Arbitrate, Mr. Kepas asserted that in two instances, eBay discriminated against him on the basis of his age: 1) in January 2005, his position was given to Susan Dutton, who was six years younger than Kepas, and he was demoted to supervisor (the "January 2005 demotion"); and 2) in November 2005, another supervisor position was created and Jason Hughes, who was eleven years younger than Kepas, was hired for the position (the "Hughes hiring"). For the first time in his Response to the

Motion for Summary Judgment, Kepas also claims that the termination of his employment in June 2006 was due to his age. And, for the first time in oral argument, Kepas further asserted that he had suffered a hostile work environment on the basis of his age.

B. The January 2005 Demotion Claim is Time-Barred.

Kepas filed his Charge of Discrimination with the Utah Antidiscrimination and Labor Commission alleging age and sex discrimination and retaliation on March 3, 2006. By law, claims based on alleged discrimination or retaliation that occurred before May 7, 2005 (300 days prior to the filing of the charge) are barred. Therefore, all Title VII claims based on the January 2005 demotion are barred.

C. The Hughes Hiring Claim Fails Due to Kepas's Admission that Legitimate Nondiscriminatory Reasons Existed for Hiring Hughes.

Kepas cannot dispute the legitimate, nondiscriminatory reason eBay proffered for creating the new position, for hiring Hughes, or for shifting a portion of Kepas's duties to Hughes. In fact, in his deposition, Kepas testified that the job of supervising all shifts was "too big for one person," that lie agreed with Susan Dutton's decision to hire another supervisor, and that Hughes was the best candidate for the job. Moreover, Kepas does not assert that Hughes was

hired to replace him, nor is there any evidence that would support such an assertion. Kepas's title and compensation remained the same after the hiring of Hughes. Kepas's dissatisfaction with the fact that Hughes reported directly to Dutton rather than to himself does not constitute an adverse employment action sufficient to form the basis of a discrimination claim. Even if it did, there is no evidence that the reporting structure was due to Kepas's age. Mr. Kepas's age discrimination claim based on the hiring of Mr. Hughes fails.

D. The Termination and Hostile Work Environment Claims Were Not Pled.

Mr. Kepas filed a Notice of Intention to Arbitrate on December 21, 2006, setting forth detailed factual allegations supporting his claims. His Third Claim for Relief, entitled "Claim for Unlawful Age Discrimination in Violation of AREA" relies on the January 2005 demotion and the Hughes hiring. It does not allege that Mr. Kepas was terminated on the basis of his age; nor does it allege that Mr. Kepas was harassed on the basis of his age. Thus, Mr. Kepas has not properly asserted these claims, and it would be patently unfair to Respondent to allow him to do so via a Response to a Motion for Summary Judgment. Even if Mr. Kepas had properly pled such claims, they would fail for the reasons set forth in section VII,C 1 below and because there is no evidence in the record that Mr. Kepas suffered any harassment due to his age.

III. SEXUAL HARASSMENT CLAIM QUID PRO QUO

Mr. Kepas claims that in March 2005, Ms. Dutton "flirtatiously" invited him to her house "so they could get to know each other better." When he declined, she suggested that Mr. Kepas could bring his son to play basketball with her son outside while she and Mr. Kepas went inside to talk. Again he declined. She told him, "Well, just think about it." And Mr. Kepas said no, and that was the end of the conversation. Ms. Dutton did not invite him to her house again.[1]

Mr. Kepas testified that he considered this invitation "flirtatious" because of "the smile, the gleam in her eye, the raising of her eyebrows, the lilt in her voice." Kepas Depo. Pp. 85-86. He testified that "she was inviting me over to her house to spend more time with her one on one. I was very uncomfortable with it." *Id.* Kepas further testified that he did not report the incident because "I didn't think people would believe me." *Id.* At 87.

Mr. Kepas claims that less than two months after he declined Ms. Dutton's invitation, on June

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[1] Although Mr. Kepas argues in his opposition brief that Ms. Dutton made several invitations of this nature to him and that he "repeatedly refused Ms. Dutton's advances," this assertion is flatly contradicted by Mr. Kepas's deposition testimony. Moreover, there is no evidence in the record of any other alleged sexual advances. For example, wearing suggestive clothing is not a sexual overture sufficient to sustain a *quid pro quo* claim.

27, 2005, eBay Human Resources changed his title back to Manager, which he claims was a "promotion," but that his pay or pay grade was not increased in connection with the title change/promotion. He claims he was also ineligible for certain bonuses due to eBay's failure to increase his pay grade when it changed his title.[2] During oral argument, Kepas significantly expanded the adverse employment actions to include everything arguably adverse that happened to him after March 2005.

"Quid pro quo sexual harassment involves the conditioning of tangible employment benefits upon submission to sexual conduct." *Sauers v. Salt Lake County*, 1 F.3d 1122, 1127 (10th Cir.1993). To sustain the claim, Mr. Kepas must offer evidence that Ms. Dutton made a sexual advance, that he rejected it, and that, as a result, he suffered a tangible adverse employment action.

Even assuming that an *implicit* sexual advance might be sufficient to sustain a *quid pro quo* claim (some courts have held to the contrary), on the evidence described above, it cannot be reasonably inferred that Dutton was seeking to have sexual relations with Kepas. There is no evidence suggesting that was the meaning Dutton intended. To the contrary, she explained that what she had in mind was simply *talking* with Kepas while their sons played basketball together

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[2] Because the alleged tangible employment action that completed the alleged *quid pro quo* harassment occurred within 300 days of the filing of Kepas's charge, the *quid pro quo* claim is timely.

outside. Nor is there any evidence that *Mr. Kepas himself* even drew such an inference at the time. He testified that he understood that Dutton was seeking to *spend more time with him* one on one, not that she was asking him to have sexual relations with her. Even if Ms. Dutton's demeanor while she made these comments was "flirtatious," as Mr. Kepas contends, flirting falls short of demanding sexual favors.

Moreover, even if there had been a sexual advance, there is no causal link between this incident and any tangible employment action. Mr. Kepas claims his pay grade should have been increased when his title was changed by Jana Heitland (with Ms. Dutton's approval). Ms. Heitland testified that the change in title was not a "promotion" but merely a change from a "technical" to "exempt" category, and this evidence is uncontradicted. Essentially, Mr. Kepas contends that the tangible employment action was Ms. Dutton's failure to cause Ms. Heitland to increase his pay grade when his title changed. However, a failure to increase a pay grade is not a tangible employment action unless there is evidence that Mr. Kepas was otherwise entitled to the increase and would have received it but for his rejection of Ms. Dutton's invitation. Mr. Kepas obviously suffered no adverse action if he failed to receive a pay grade increase that he was entitled to and would not have received anyway. No evidence exists in the record that Mr. I was entitled to or even eligible for a pay grade increase due to this title change. No evident exists that Ms. Dutton caused Ms. Heitland not to

increase Mr. Kepas's pay grade. And no evidence exists that Mr. Kepas was treated differently than similarly situated employees.

All of the other adverse events Mr. Kepas alluded to in oral argument (such as being informed that he would be put on a performance improvement plan, and his eventual termination) are likewise without evidence causally linking them to Mr. Kepas's declining 1\ Dutton's invitation to spend time with her. No direct evidence of any causal link exists, and events are too remote in time to support any inference of causation.

For these reasons, Mr. Kepas's *quid pro quo* sexual harassment claim cannot survive

IV. SEXUAL HARASSMENT CLAIM HOSTILE WORK ENVIRONMENT

Mr. Kepas alleges that he was subjected to the following specific incidents[3] while employed at eBay:

- Dutton showed him, on her computer screen, a picture of a bikini she intended buy. Dutton did not make any sexually suggestive comments about the bikini.
- Dutton showed him, on her computer

[3] Claimant's liberal sprinkling of judgment-laden phrases in his briefing and argument, such as "sexual propositions and sexually charged language and behavior," does not constitute evidence. I must consider only the specific evidence in the record.

screen, a picture of a small, black dress intended to wear to a company party. Dutton did not make any sexually suggestive comments about the black dress.

- In a one-on-one meeting with him, Dutton turned off the lights and said, "I hate doing things with the lights on." Dutton did not make any sexually suggestive comments or sexual advances during the meeting.

- Dutton wore tight fitting clothes with writing or glitter across her chest.

- Dutton wore suggestive clothing and would abruptly stand up when he was sitting at her desk or suddenly bend over while he was talking to her.

- Kepas heard Dutton use the "F word" on average approximately twice a month.

- Dutton told Kepas that she spent the whole weekend in bed with her boyfriend and got a kidney infection.

- Dutton told him her son had been arrested for rape but would not be convicted because one of his friends told the police that the victim had consented.
- Dutton told him and other employees

that she had hurt her back in a "circle jerk" that morning.

- Dutton instructed him to write up an employee for failing to report to work and then took an inconsistent position with that employee, making Mr. Kepas look like a poor manager.

- Dutton reassigned employees who reported to Kepas to report to Hughes or herself.

- Dutton told Kepas three times that Jones hated or disliked him and that he needed to find another position.

- Dutton told Kepas she had received an email from Jones personally attacking him, but then refused to read the email to him.

- Dutton instructed Hughes to monitor Kepas's activities.

- Dutton attempted to allocate Kepas's stock options to other employees.

- Jones pointed out Mr. Kepas's absence in a company meeting.

Mr. Kepas also asserts that his demotion and Dutton's inviting him to her house, as described above, were part of the hostile work environment. However, as addressed above, all

claims based on the demotion are time-barred. The demotion, as a discrete act, cannot be combined with the other acts under a continuing violation theory, nor does it constitute hostile work environment harassment under the applicable definitions. Likewise, Dutton's invitation, a discrete act, occurred outside the 300-day window. Although these events can be considered as background evidence to explain how other incidents within the 300-day window constitute harassment based on sex, they cannot be considered as part of the actionable hostile work environment.

Mr. Kepas mentions other incidents that he was unaware of at the time they occurred, or at the time the alleged hostile work environment existed, such as Dutton's purported conduct during a Christmas party, at an after-hours gathering and at a bar after an eBay event. Mr. Kepas presents no evidence that these alleged incidents were perceived by him to be hostile or abusive at the time he was employed by eBay. Apparently, he learned of these incidents after his termination; thus, these incidents cannot have contributed to the hostile work environment Mr. Kepas claims to have experienced.

In evaluating whether a working environment is sufficiently hostile or abusive, all of the circumstances must be considered, including the "frequency of the discriminating conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes

with an employee's work performance." *Faragher v. City of Boca Raton*, 524 U.S. 775, 141 L. Ed. 2d 662, 118 S. Ct. 2275, 2283 (1998). For Kepas to succeded on his hostile work environment claim, the alleged sexual harassment must be "severe or pervasive" as to "'alter the conditions of [his] employment and create an abusive working environment.'" *Id.* The work environment "must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." *Id.*

eBay contends that most of the incidents cannot be considered because they were never reported to eBay and thus there is no basis for holding eBay liable for the alleged harassment. But even considering all of the incidents Mr. Kepas has described, he has failed to show anything other than a few isolated comments or conduct, most of which would have been only mildly offensive to a reasonable person. Kepas has not shown the kind of steady barrage of objectively offensive comments or conduct that would constitute pervasive sexual harassment. Nor has he shown a single incident so objectively extreme or severe that it would amount to a change in the terms and conditions of his employment. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986); *Faragher*, 118 S. Ct. at 2284. There is no contemporaneous evidence that Mr. Kepas found this conduct offensive or unwelcome. He apparently never even told Ms. Dutton that he found her conduct offensive. And he never

reported any of the incidents he now claims constituted sexual harassment (with the exception of the "circle jerk" comment). While some of the comments and conduct he alleges may have been somewhat strange or inappropriate in a business setting, they lack the objective severity to be actionable.

Moreover, there is no evidence that Mr. Kepas was subjected to any of these incidents on the basis of his gender. Ms. Dutton did not tell sexually suggestive jokes or describe what she did with her boyfriend in bed; she did not proposition Mr. Kepas or touch him inappropriately. Certainly, she shared more personal information than was appropriate in a business or professional setting, but, as many courts have said, Title VII is not a general civility code, nor is it intended to prevent unprofessional or unbusinesslike behavior. It is intended to prevent harassment *on the basis of one's sex,* a form of sex discrimination. No reasonable factfinder could conclude that such a sexually hostile work environment existed on the basis of the evidence presented here. Thus, Kepas's hostile work environment claim cannot survive.

V. RETALIATION CLAIM

A *prima facie* case of retaliation in violation of Title VII requires the plaintiff to establish that: 1) he engaged in protected opposition to discrimination; 2) he suffered an adverse employment action; and 3) there is a causal connection between the protected opposition and

the adverse employment action. *O'Neal v. Ferguson Constr. Co.*, 237 F.3d 1248 (10th Cir. 2001). Kepas alleges that he engaged in protected activity by reporting the unlawful sexual harassment committed by Jones and Dutton and that, as a result, three adverse employment actions were taken against him: 1) within two weeks of Kepas's complaints, Dutton asked Hughes to monitor Kepas's activities, and Hughes began reporting perceived performance deficiencies to Dutton; 2) less than one month after Kepas's complaint, Dutton tried to reduce the stock options assigned to Kepas by allocating the stock options to others contrary to eBay stock allocation guidelines, requiring Kepas to complain to human resources about the improper allocation; and 3) less than a month after his complaint, instead of properly investigating his complaints, eBay's human resources department conducted a meeting about Kepas's performance and told him he would be put on a performance improvement plan.[4]

A. Performance Monitoring

eBay argues that there is not sufficient evidence that Dutton asked Hughes to monitor Kepas's activities and points out that both Dutton and Hughes testified that this did not occur. However, Clinton Ericson provided a sworn statement in which he claims that Hughes told

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[4] Although Kepas initially alleged that other acts were retaliatory, he has apparently abandoned those allegations.

him that "just prior to Mr. Kepas' leaving, Susan Dutton told him to watch what Mr. Kepas was doing and to report back to her on his activities." Kepas also testified that Hughes confessed to him I Dutton had asked him to "watch" Kepas and to observe what he was doing and to "get back her on it." Kepas testified that he "immediately called the hot line and filed retaliation" about "Jason Hughes observing me at the request of Susan Dutton which I felt was retaliation ... Kepas submits the Alertline Memorandum that was prepared as a result of this telephone complaint of retaliation on January 31, 2006. That Memorandum states that Kepas reported Hughes informed Kepas that Dutton "had instructed him to monitor [Kepas] for the past twc three days." Kepas also reported that Hughes "said he turned in minor reports, but did not v to do it." Kepas also submits emails Hughes sent Dutton on January 26 and January 27, 2006 commenting on aspects of Kepas's performance. Sufficient evidence exists from which a reasonable inference could be drawn that Dutton did ask Hughes to monitor Kepas's performance.

eBay further argues that Dutton's request that Hughes monitor Kepas's performance report back to her does not constitute a materially adverse employment action sufficient to sustain a retaliation claim. Under Burlington Northern & Santa Fe Ry. Co. v. White, 548 U. 53, 57 (2006), Title VII's anti-retaliation provision "covers those (and only those) employer actions that would have been materially adverse to a reasonable employee ... [meaning] that the employer's actions must be

harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."

For example, in *Burlington Northern*, the plaintiff suffered a suspension without pay 37 days, but eventually received reimbursement. She and her family had to live for 37 days without income and did not know during that time whether or when she could return to work. The plaintiff testified about the physical and emotional hardship that resulted from being deprived of her income for 37 days. In such a situation, the Court said, "a reasonable employee facing the choice between retaining her job (and paycheck) and filing a discrimination complaint might well choose the former.... That is to say, an indefinite suspension without pay could well act as a deterrent, even if the suspended employee eventually received backpay." Only significant harms, not trivial harms, can sustain a retaliation claim. *Id.*

Kepas does not describe any specific harm that resulted from having his performance monitored by Hughes. Although Kepas was later told that he would receive a performance improvement plan (PIP), there is no evidence that the PIP would have been based on inform gathered during the monitoring, as opposed to all of the other information that was available indicating Kepas's performance issues. Perhaps such monitoring made Kepas uncomfortable, but such harm is trivial, not at all analogous to the situation in Burlington. Although it is possible

that "*sufficiently severe* harassing, following, and monitoring of an employee could create an adverse employment action," *Tapia v. City of Albuquerque,* 170 Fed. Appx. 529, 533 (10th Cir. 2006), no such severe treatment occurred here. For example, Kepas does not assert that Hughes monitored him in a harassing or inappropriate way. Nor does Kepas claim that Dutton told Hughes to concoct unfair, untrue or negative reports about him, or even that Hughes lied to Dutton about his observations. Kepas does not assert that the monitoring continued over an unreasonably long period of time, that it humiliated or intimidated him, or that it interfered with his performance of his job duties.

Moreover, the monitoring apparently did not deter Kepas from pursuing further complaints, as he "immediately called the hot line" and filed an internal complaint about the perceived retaliation. *See Somoza v. Univ. of Denver,* 513 F.3d 1206, 1214 (10th Cir. 2008) ("[T]he fact that an employee continues to be undeterred in his or her pursuit of a remedy ... may shed light as to whether the actions are sufficiently material and adverse to be actionable."). Thus, being subjected to monitoring of the nature described by Kepas does not constitute a *materially* adverse employment action sufficient to sustain his retaliation claim.

B. Stock Option Allocation

Taking the evidence in the light most favorable to Mr. Kepas, Ms. Dutton told Mr.

Kepas to allocate stock options in a way that violated eBay policy. Although Kepas told Dutton that the allocation was "outside policy" and "there are not enough stock options assigned to the team for me to do what you are asking me to do," she refused to change it, stating, "Well, there is now." Kepas then emailed Anderson, HR Manager, asking him to review the stock allocations. Anderson advised Kepas that Wakeham, Dutton's supervisor, would review the allocation. Wakeham then instructed Kepas to correct the stock allocation while Dutton was on vacation. Thus, the allocation that Ms. Dutton instructed Mr. Kepas to implement never took effect. Apparently, if the stock options had been distributed as Dutton originally instructed, Kepas and several other management level employees would have received fewer stock options than they otherwise received.

Again, Kepas does not present evidence that he sustained any loss or hardship whatsoever as a result of Dutton's attempt to misallocate the stock options. Again, Kepas was not dissuaded from making a complaint about the stock allocation. He made a complaint, and the matter was quickly rectified. No reasonable employee would have considered this incident to be materially adverse, and it would not have dissuaded a reasonable person from making or supporting a charge of discrimination. "An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience." *Burlington Northern,*

548 U.S. at 68. Having one's stock options misallocated for a few days simply does not constitute a materially adverse employment action sufficient to sustain a retaliation claim.

C. Plan to put Kepas on a Performance Improvement Plan

On February 8, 2006, Anderson, HR Manager, met with Kepas to advise him of the outcome of the investigation of his harassment complaint against Dutton and Jones. In that same meeting, according to Kepas, Anderson told Kepas "that he was aware that there were some issues that [Kepas] had that ... John Wakeham and Susan Dutton, were going to address as well with [Kepas]." When Kepas asked what those issues were, Anderson "said he didn't know what they were at that time, but they were going to prepare a performance improvement plan and that [Kepas] would receive it." Anderson said that "they would have to get together and figure out what that was and then get back to me." Kepas further testified, "No one shared with me a performance improvement plan all I was told was one would be given. I was not told what it would be given for nor have I seen it or signed it."

According to Kepas, Anderson mentioned that "depending on how [Kepas] reacted or responded to this PIP would determine [Kepas's] future employment." Kepas felt this was a threat, but agreed that "[i]f I felt the performance improvement plan was false and fabricated, I think I would be able to respond to it

appropriately and that it shouldn't affect my future with the company." Kepas Deposition, pp. 157-160. Prior to the meeting on February 8 with Anderson, Kepas had been attempting to arrange a medical leave. Anderson told Kepas that if he took a leave, the "corrective counseling" would occur after he returned. On February 16, Kepas took a medical leave. Shortly after that, Kepas took a leave of absence and was later discharged. Thus, the PIP was never issued.

eBay first contends that no materially adverse action occurred because: 1) the PIP was never issued; and 2) even if it had been issued, a PIP, standing alone, is not an adverse employment action. eBay initially relied on *Haynes v. Level 3 Communications, LLC*, 456 F.3d 1215, 1224 (10th Cir. 2006), but Kepas correctly pointed out that *Haynes* is inapposite because it held that a PIP was not an adverse employment action sufficient to support a *discrimination* claim, not a *retaliation* claim, and, as *Burlington Northern* made clear, "the antiretaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment. *Id.* At 64. However, eBay replied to this point by citing several cases from other jurisdictions decided after *Burlington Northern*, holding that even in the context of a retaliation claim, being issued a performance improvement plan or a written reprimand does not rise to the level of being materially adverse sufficient to support a retaliation claim.

To the extent these cases suggest that receiving a PIP can *never* be materially adverse as a matter of law, I disagree. A PIP means that the employee's performance is unsatisfactory in some respect and must improve substantially if he or she is to remain employed. eBay concedes that a PIP carried the possibility of termination if no improvement was made and that a PIP could make an employee ineligible for a transfer or promotion. Whether or not any particular PIP would be materially adverse enough to support a retaliation claim can only be decided by looking at all the surrounding circumstances, as the Court pointed out in Burlington Northern.

However, whether an actual PIP, had it been issued, would have constituted a materially adverse action is not the issue here. Kepas never received the PIP. The issue is whether merely *being told* that there will be a PIP is materially adverse under the circumstances that existed on February 8, 2006 in connection with Kepas's employment at eBay. Under these circumstances, that there would be a PEP issued to Mr. Kepas should have come as no surprise to him and did not constitute any material adverse change in his job situation.

Kepas did not engage in any protected activity until late January 2006. Several weeks before his complaints, in November 2005, the eWatch team participated in a Pulse Survey, which evaluated the management of the eWatch team, including Kepas. Kepas's score was 29%,

the lowest in Salt Lake City and the lowest in customer support as a whole. In December 2005, before Kepas's protected conduct, Dutton met with Kepas and told him that "he would probably go on a personal improvement plan because he scored so low." Dutton explained that she did not issue the PIP at that time because "what I wanted to do was contact HR, because there were comments, but there wasn't – I wanted to get more meat around it in order to determine and work with HR and take steps for that. So I think what we were doing is we were outlining specific action items that I was seeing until I got the rest of that meat to determine if we were going to do a personal improvement plan." She further explained that she was waiting until Heitland conducted the skip level meetings with Kepas's direct reports because "there were comments but it wasn't a lot of meat. So I wasn't correlating exactly why the team had scored him so low." Even though Dutton wanted more "meat" before issuing a PIP, she did discuss with Kepas in the December meeting that there would be an "action plan" specifically directed at correcting the issues that had resulted in the low survey score. Heitland testified that Dutton spoke to her in December 2005 about the survey and that they decided to conduct meetings with Kepas's team in order to specifically discuss Kepas's performance issues.

Thus Mr. Kepas is not on the same footing as an employee with a record of good performance, who was never advised of any performance issues until after a complaint was made. Kepas does not deny, or submit any evidence to contradict, this

evidence that his performance issues were already under discussion by eBay management before he made his complaints in January 2006. Kepas does not dispute that Dutton met with him in December 2005 to discuss the low scores on his Pulse Survey and to discuss an "action plan" to correct those issues. However, Kepas contends that Dutton did not specifically mention a "PIP" at that time, and that it was not until after his complaint that Dutton and others then determined Kepas would receive a "PIP" rather than an "action plan." Although Mr. Kepas points to Ms. Dutton's testimony that an "action plan" is not the same as a PIP. However, Mr. Kepas fails to demonstrate how the PIP he was later told he would receive was materially more adverse than the "action plan" that was discussed with him before he complained. Nor would it be possible to make such a showing, since he never learned what was to be included in the PIP, whether the PIP would have contained reasonable and legitimate expectations, or what the consequences would have been had he failed the PIP. Under these circumstances, being advised that a PIP is imminent is not a materially adverse action sufficient to support a retaliation claim.

Even if Mr. Kepas had made out a prima facie case of retaliation, lie has no evidence to show that eBay's proferred nondiscriminatory reason for the decision to give him a PIP was a pretext for retaliation. Kepas's performance issues pre-existing his complaints are well documented and, importantly, the sources of these criticisms are not primarily Dutton. The survey results were

driven by the employees who reported to Kepas. There is no evidence that Ms. Dutton, Ms. Patterson, Ms. Jones or any of the others Mr. Kepas blames influenced these scores in any way.

Kepas attempts to explain away his low survey score by submitting the affidavit of Scheuerman, who claims that he and others thought they were evaluating *Dutton's* performance, not Kepas's (even though Kepas's name appeared on the survey and Duttons name appeared on a different survey), because that is what they had been instructed to do in an earlier survey. At most, Scheuerman's testimony, if believed, could establish that one survey participant was confused about whose performance he was reviewing. (Scheuerman's statements about what others thought is inadmissible hearsay.) Kepas does not show that Scheuerman's confusion significantly skewed the results, or that his confusion was shared by others. Moreover, Kepas's assertion that the other team members were similarly confused about whom they were evaluating is implausible, because they mentioned Kepas *by name* in their written comments and also in the meeting Heitland conducted in late January 2006. Kepas does not dispute that many team members (who had no involvement in any alleged harassment or retaliation) made serious negative comments about his performance and management abilities during that meeting.

In fact, Mr. Kepas essentially admits the performance problems but claims they were

caused by Dutton's "harassment" of him. Kepas does not explain how any alleged "harassment" caused his performance to decline. As mentioned above, the alleged harassment was not so severe that it would have affected any reasonable employee's performance. Kepas contends that Dutton gave him "inconsistent directions" that prevented him from managing his team effectively. The sole example of this is that on one occasion, Dutton told Kepas to write up a warning for an employee for failing to call in or come to work, but then told Kepas in front of the employee that Kepas had acted inappropriately in preparing the warning. Kepas also mentions that he was unable to rely on his own judgment because of a disagreement he had with Dutton over whether a certain employee should be promoted and a disagreement he had with Dutton and Hughes over whether another employee should receive a "two" or a "three" performance rating. None of these alleged actions by Dutton could remotely be construed as illegal harassment.

Kepas fails to show how any of the specific criticisms of his performance were related to Dutton's "harassment" when most of them had nothing to do with the incidents he describes. It is undisputed that Kepas's team complained, for example, that Kepas "micromanages insignificant things," "tends not to listen," "doesn't have the technical knowledge to do the job," "is demeaning," "is not receptive to feedback," "doesn't answer the phone," communications are

"awkward" and demonstrate poor judgment, and "passes the buck."

Kepas's other evidence of pretext consists of showing that Kepas's conduct in connection with the "sign-in" issue was really not an issue and did not become an issue until after he made his complaints and that Hughes's handling of the sign-in issue was similar to Kepas's, yet Hughes was not issued a PIP. Had the decision to issue the PIP been primarily due to Kepas's handling of the sign-in issue, this evidence might have shown pretext, but such was not the case. There is no evidence that the PIP would have been issued solely because of Kep as's handling of the sign-in issue, as opposed to the numerous other problems that surfaced in the survey. Since the PIP was never issued, there is no way to know whether it would have even included the sign-in issue.

Kepas also points out that he received much better survey results in late 2004; however such evidence does not tend to prove that he did not have poor survey results in late 2005 or that it was illegitimate for eBay to decide to deal with those poor survey results via a PIP.

Kepas further points out that he had received "meets" or "exceeds" quarterly and annual performance ratings prior to the performance improvement plan, and Dutton had never before disciplined Kepas. Again, this is not sufficient evidence that the PIP was pretextual in light of the abundant evidence of Kepas's

performance issues *originating before his complaints*, that would have supported the issuance of a PIP.

In conclusion, Kepas's being informed that he would be issued a PIP did not materially adversely affect him, and, even if it had, Kepas cannot show that eBay's reasons for deciding to issue him a PIP are a pretext for retaliation. Thus, Kepas's retaliation claim fails.

VI. BREACH OF CONTRACT CLAIMS

Kepas contends eBay violated its employment policies, which constituted a contract with him, by retaliating against him for his complaints of discrimination and by failing to discipline Dutton and Jones on the basis of his complaints. Assuming without deciding that the employment policies were enforceable contracts, the claim still cannot survive.

As discussed above, there is insufficient evidence to support the claim that eBay retaliated against Kepas for his complaints. Additionally, eBay did not breach its policy by failing to discipline Dutton and Jones because the policy states that eBay will discipline anyone "who has been found after investigation by eBay to have engaged in conduct in violation of this policy." eBay's internal investigation did not find that Dutton and Jones had engaged in discriminatory and/or retaliatory conduct in violation of the policy. eBay did not make a contract with Kepas that it would discipline

anyone about whom he complained regardless of the outcome of its investigation. Therefore, the policy, even if was a contract, was not breached.

VII. DISCRIMINATORY TERMINATION CLAIMS

A. Undisputed Facts Concerning Kepas's Termination

The following facts regarding Kepas's termination are either undisputed by Kepas or, if disputed, taken in the light most favorable to Kepas. Kepas alleges that as a result of the intense stress he experienced at work, he developed tinnitus and anxiety, which grew progressively worse until he could no longer work and had to take a leave of absence. Kepas stated that his tinnitus was noninvasive until January 2006, when Dutton and Jones "escalated their campaign of harassment" against him. It was at that point that he claims the tinnitus grew worse until he was unable to work.

On February 16, 2006, Kepas took a leave of absence due to his tinnitus. His request for paid leave, submitted on February 24, 2006 states: "On February 16th I began a leave of absence from eBay for several reasons. These include, among others: (1) the physical and emotional effects caused by the behaviors of Carolyn Patterson, Wendy Jones and Susan Dutton, which I detailed in eBay ethic hotline complaints on January 20th & 23rd; (2) Tinnitus that has significantly

increased in severity since the offending behavior of these individuals escalated."

On March 10, 2006, Patrick R. McDermott, MD, FACP noted "anxiety and depression symptoms," "diagnosis PSTD (sic), panic, anxiety and depression, insomnia ppt by sexual harrisment (sic)," "patient has been advised by psychology and psychiatry to not return to the prior work environment that precipitated his symptoms," "symptoms occurring at the workplace due to PS TD (sic)," "unable to function due to fear of reprisal at work." It is unclear whether McDermott was simply reporting what Kepas told him about the cause of his symptoms, or whether McDermott himself formed an opinion that the work environment was the cause of Kepas's problems. A summary prepared by Layne Garrett, an audiologist, indicates "onset clinically significant tinnitus appears to correlate to increased stress in the workplace" and "increase (sic) stress puts pressure on the autonomic nervous system which exacerbates tine which can make the perception of intensity and severity increase " eBay filed a motion exclude the opinions of McDermott and Garrett as to the cause of Kepas's problems.

Kepas applied for short term disability benefits, which were denied. He applied for FMLA leave, which was granted. eBay allowed Kepas to remain on unpaid leave after his FMLA leave expired while he appealed the denial of short term disability benefits and while he appealed the denial of worker's compensation benefits. By June

2006, Kepas's leave had ex and his appeals for additional benefits had been denied. On or about June 12, 2006, eBay's counsel, Laurie Chambers, and Kepas's counsel, Scott Crook, discussed Kepas's return to w In a letter dated June 13, 2006, confirming and following up on that conversation, Crook reported that Kepas was concerned that he would be required to report to Dutton or Jones ai would likely be reluctant to transfer to another position in the chain of command of Jones. Crook stated that Kepas "has not foreclosed a return to work if the conditions of the return not cause his medical conditions to suffer." Crook stated that Kepas's audiologist explainer "it will take 12 to 18 months for Mr. Kepas to reach a final state of recovery" and "identified the stress caused by Mr. Kepas' work environment to be the cause of the tinnitus." Crook states Kepas was being treated for panic, anxiety, depressive symptoms and post traumatic stress disorder and that his clinical social worker had stated that "Mr. Kepas requires further intervention before he is allowed to return to work." Crook stated, "Given these significant problems, it is unlikely that Mr. Kepas will be able to immediately return to work."

In a letter dated June 14, 2006, Chambers responded. She stated, "You have not provided any information which supports your client's need for an extended leave. Absent such information, Mr. Kepas must return to work." She stated that the discussion of a transfer w moot, since Kepas had refused any position in Jones' chain of command, and the entire customer support

organization was in Jones' chain of command. Chambers stated that since Kepas's claims were not substantiated either by the internal investigation or by an independent investigator, "there is no reason that Mr. Kepas should not return to his position under Ms. Dutton. That said, in order to ensure a smooth return and to allay Mr. Kepas's concerns, I suggested a different reporting relationship. Mr. Kepas has refused that and apparently any position in our customer support organization "

On June 26, 2006, Chambers wrote Crook stating, "Mr. Kepas has exhausted his available leave under FMLA. His workers' comp claim was denied, as was his Short Term Disability (STD) Claim. eBay had agreed that Mr. Kepas could remain out on unpaid administrative leave pending his STD appeal. The STD denial was upheld on appeal over o month ago. As such, your client's current absence is unapproved and unexcused and he mu return to work if he still wants employment with eBay." Chambers stated, "Mr. Kepas will return to his current position. He may report directly to Mr. Wakehazn." She advised that I "should plan to return to work on Wednesday, June 28, 2006....If Mr. Kepas does not return to work, we will assume he is resigning from eBay and will process his separation accordingly.

Thereafter, Mr. Kepas did not report to work and was terminated.

B. eBay's Nondiscriminatory Reason for Termination

eBay asserts that Kepas was terminated as a result of his failure to return to work.

C. Kepas's Evidence of Pretext

1. Age Discrimination

Kepas's sole "evidence" that his termination was motivated by discriminatory animus on the basis of his age consists of one comment made by Jones when she was training to run a race that "I know I have to do this kind of thing now because once I hit a certain age ... I wouldn't be able to do that anymore. I'll be too old to do that kind of thing."[5] The comment related solely to her own personal physical ability to run a race. It does not indicate that Jones believed that persons Kepas's age were incapable of doing their jobs. Moreover, Mr. Kepas fails to establish even the most tenuous connection between this comment and his termination. There is no evidence that Ms. Jones made or had input into the decision to terminate him. Kepas's claim that he was terminated on the basis of his age, even if properly pled, would fail.

2. Retaliation

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[5] The witness who described this comment, Ms. Whalen, testified that "the implication was that once you got to a certain age, you were not going to be very valuable." Jones did not say such a thing, and the "implication" Whalen read into it is patently unreasonable.

Kepas has apparently abandoned his claim that he was terminated in retaliation for his complaints, as he fails to make any argument countering eBay's evidence that the termination was unrelated to his protected activity.

3. Sex Discrimination

It is undisputed that Kepas was invited to return to work and failed to do so, causing his own termination. However, Kepas could still maintain a claim that his termination was discriminatory if he demonstrates that he was constructively discharged. To establish a claim of constructive discharge under Title VII, plaintiff must demonstrate that defendant's discriminatory conduct produced working conditions that a reasonable person would view as intolerable. *Daemi v. Church's Fried Chicken, Inc.*, 931 F.2d 1379, 1386 (10th Cir. 1991). The issue is whether defendant's illegal discriminatory acts made the working conditions so difficult that a reasonable person would feel compelled to resign. Derr v. Gulf Oil Corp., 796 F.2d 340, 344 (10th Cir. 1986); *see also Schweitzer-Reschke*, 874 F. Supp. 1187, 1195-96 (D. Kan. 1995). The standard is an objective one.

Kepas himself described the cause of the medical problems that forced him to take a leave as "the physical and emotional effects caused by the behaviors of Carolyn Patterson, Wendy Jones and Susan Dutton, which I detailed in eBay ethic hotline complaints on January 20th & 23rd." Kepas filed four hotline complaints from January 20-3 1.

The January 20 and 23 calls pertained to Dutton's comment that she had hurt herself while participating in a "circle jerk." The January 24 call complained of the following:

- Dutton told Kepas she got an email from Jones stating that Jones disliked Kepas; Dutton said Jones used words that she could not repeat.

- Dutton met with Kepas and told him two of his employees would be reassigned to report to her. Dutton said she did not understand why Jones dislikes him.

- Dutton told Kepas that Jones hates him and that he needed to post for a position outside of the customer service department so that he was out of Jones' line of authority.

- At a meeting of customer service managers, Jones called on Kepas, even though he had left the meeting early for a physician's appointment, in an attempt to embarrass him in font of his peers.

The January 31 call complained that Dutton had met with Kepas, was upset, and told Kepas "there was a lot of tension between them." Dutton tried to get Kepas to talk, but Kepas was uncomfortable talking. Kepas reported that

Hughes informed him that Dutton instructed him to monitor Kepas as a form of retribution.

Giving Kepas the benefit of every doubt, and even assuming that these incidents did, in fact, cause him severe emotional distress and increase the severity of his tinnitus to the extent that he could not return to work, Kepas cannot maintain a claim of sex discrimination resulting in termination because his working conditions were not so intolerable that a *reasonable* person would have felt compelled to resign. Kepas may have perceived the work environment as hostile and abusive, but for Kepas to succeed on his hostile work environment claim, the work environment "must be both *objectively* and subjectively offensive, one that a reasonable person would fund hostile or abusive." *Faragher v. City of Boca Raton,* 524 U.S. 775, 141 L. Ed. 2d 662, 118 S. Ct. 2275, 2283 (1998). Here, as explained above, the incidents do not even constitute an actionable hostile work environment, let alone an objectively *intolerable* one.

It matters not whether Dutton's or Jones' conduct toward Mr. Kepas actually caused the tinnitus to worsen because, even if it did, there is no evidence that Dutton or Jones engaged in the alleged conduct *because of his gender*. Whalen testified that certain employees, all of whom were female, would fall in and out of favor with Jones. A female employee, Dombrowski, made a sexual harassment complaint against Jones in October 2007. Dutton exposed her breasts to Jones and others at a restaurant before Kepas was demoted and Dutton took his place as eWatch manager.

This evidence, Kepas contends, supports the inference that Jones was "placing women in positions where she could have easier access to them," that "Jones discriminated against men in favor of a certain group of women employees that she preferred" and that "it was due to this discrimination that Mr. Kepas was terminated by eBay."

I am not required to draw every inference Mr. Kepas suggests; I am only required to draw *reasonable inferences*. Kepas's suggested inferences are patently unreasonable in light of the undisputed fact that Jones did not terminate his employment or create the circumstances that led to his departure. Kepas voluntarily took a medical leave that was in no way suggested or precipitated by Jones. He was terminated when he failed to return to work after his leave was exhausted, despite eBay's agreement to change his reporting relationship. There is no evidence to support Kepas's assertion that he was terminated to make way for one of Jones' favored female employees. In fact, Kepas claims he was replaced by Hughes, a male. Kepas has no evidence that similarly situated female employees who failed to return to work after their leaves were exhausted were not terminated. Kepas has neither direct evidence of discrimination, nor indirect evidence sufficient to support a *reasonable probability* that he would not have been terminated but for his gender, as required by *Notari v. Denver Water Dept,* 971 F.2d 585, 590 (10th Cir. 1992). Kepas's facts fall far short of demonstrating "background

circumstances" sufficient to create an inference of reverse discrimination under *Notari's* standards.

VIII. CONCLUSION

Because each of Mr. Kepas's claims fail as a matter of law, there is no need to address eBay's remaining arguments concerning proof of damages. Judgment is hereby entered in favor of eBay on all claims. Emmanuel Kepas's claims are hereby dismissed with prejudice, each party to pay its own costs and attorney's fees.

The administrative fees and expenses of the American Arbitration Association totaling $1,376.48, shall be borne by eBay, Inc., and the compensation and expenses of the arbitrator totaling $31,778.73, shall be borne by eBay, Inc.

This Award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby, denied.

Dated: July-30,2008. /s/
Theresa L. Corrada
Arbitrator

APPENDIX D

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Attorneys for Defendant eBay Inc.

FILED
2007 Jan 10
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DISTRICT

EMMANUEL D. KEPAS,	**[PROPOSED ORDER] COMPELLING ARBITRATION AND STAYING PROCEEDINGS**
Plaintiff,	
v.	
EBAY INC., a Delaware corporation ,	Case No. 2:06cv00612 DB
Defendant.	The Honorable Dee Benson

On December 13, 2006, this court heard argument on Defendant eBay Inc.'s

("eBay")Motion to Compel Arbitration and Dismiss or Stay Proceedings (the "Motion") pursuant to an arbitration agreement (the "Agreement") between Plaintiff and eBay. Having heard the argument of the parties and reviewed the papers and pleadings in this matter, and pursuant to Rule 7 of the Federal Rules of Civil Procedure and the Federal Arbitration Act, 9 U.S.C. § 1 , *et seq.*,

IT IS HEREBY ORDERED as follows:

1. The Motion is granted upon the condition that eBay agrees that the arbitrator(s) selected in this case shall have no authority to award eBay arbitrator fees or the costs associated with room or other facility rental for the arbitration hearing;

2. The arbitrator(s) may award to eBay only those costs that could be awarded in a

proceeding under the Federal Rules of Civil Procedure or the Local Rules of the Utah Federal District Court;

3. The provision in the Agreement requiring the arbitration hearing in this matter to occur in Santa Clara, California is hereby modified to allow the arbitration hearing to occur in Santa Clara County, California or in Salt Lake City, Utah, at the Plaintiff's election;

4. Proceedings in this matter captioned above are here by stayed pending the outcome of the arbitration proceedings between the parties.

DATED this 9th day of December, 2006.

BY THE COURT

/s/
Dee Benson
United States District Court Judge

APPROVED AS TO FORM:

SMITH HARTVIGSEN PLLC

/s/D. Scott Crook
D. Scott Crook
Attorneys for Plaintiff

APPENDIX E

UTAH LABOR COMMISSION
ADJUDICATION DIVISION
PO Box 146615
Salt Lake City, Utah 84114-6615
801-530-6800

EMMANUEL D KEPAS,	**FINDINGS OF**
Petitioner,	**FACT,**
	CONCLUSIONS
vs.	**OF LAW, AND**
	ORDER
EBAY INC and/or	
AMERICAN HOME	**Case No. 06-0439**
ASSURANCE,	
Respondent.	**Judge Debbie L.**
	Hann

HEARING: Labor Commission, 160 East 300 South, Salt Lake City, Utah, on October 19, 2006 and again for supplemental hearing on December 18, 2006. Said Hearings were pursuant to Order and Notice of the Commission.

BEFORE: Debbie L. Hann, Administrative Law Judge.

APPEARANCES: The petitioner, Emmanuel D Kepas, was present and represented by his/her attorney Melvin A Cook Esq.

The respondents, Ebay Inc and American Home Assurance, were represented by attorney Carrie Taylor Esq.

STATEMENT OF THE CASE

The petitioner's May 4, 2006 Application for Hearing alleges entitled to medical expenses, recommended medical care, temporary total disability compensation, permanent partial disability compensation and travel expenses as the result of both an injury and occupational exposure causing tinnitus on August 10, 2005 and February 16, 2006 as the result of workplace stress. Adjudicative proceedings were commenced by the Commission on May 9, 2006 by issuing an Order for Answer.

The respondents' July 3, 2006 Answer denied the petitioner suffered injury or occupational exposure as alleged. The respondents also asserted the petitioner's claim is barred because the basis of the claim is a good faith employer action and that the occupational disease claim is subject to apportionment because of exposure to stress outside the workplace.

At the hearing, the petitioner amended his claim to occupational disease as the result of exposure to extraordinary mental stress over his period of employment from July 2003 through February 16, 2006. The petitioner also withdrew his claim for permanent partial disability compensation.

FINDINGS OF FACT

The petitioner was employed by the respondent, eBay, from July 21, 2003 until he was terminated from his employment in 2006. His last day worked was on or about February 16, 2006.

The petitioner was hired into the position of eWatch manager. The primary duties of the eWatch manager are to the people who work on the eWatch team. These employees work 8 hour shifts within a 24 hour day/ 7 day per week schedule. The eWatch team function was to both monitor the Ebay website and take calls and emails related to problems with website function. Depending on the severity of the problem, the eWatch manager may be-contacted at home by phone and/or email. The problems monitored by the team are either resolved by the team or the team acts as a clearinghouse to involve the appropriate teams within eBay to resolve the problem. The eWatch team was responsible for ensuring appropriate communication among personnel necessary to solve the problem and also to provide status communications to appropriate upper management staff.

Because of the 24 hour nature of eBay operations, problems with website function can occur anytime within a 24 hour period so immediate response is necessary, no matter the time of day. This requires an on-call schedule for eWatch senior staff because a manager is not always present on site with the eWatch team. On call duties are rotated on a weekly basis. There is also a possibility that if the designated on call person is unavailable, the other on call personnel could be contacted. The eWatch team has one designated team member per shift who is responsible for making the on call contact.

The petitioner was in a salaried position so did not have set work hours. Although the petitioner testified he worked between 70 and 80 hours per week on regular basis, this testimony is not supported by a preponderance of the evidence.

The petitioner usually arrived to work at 8:45 a.m. although there were days when he came in as early as 6:00 a.m. and other days when he did not arrive until 9 or 10 a.m. The petitioner usually left work between 5 and 6 p.m. as he prepared the family evening meal most evenings and they ate dinner between 6:00 and 6:30 pm. This is also consistent with Will King's testimony, an eWatch employee since September 2000, and Jason Hughes' testimony, an employee since November 2005, who both observed the petitioner usually leave work at between 5 and 6 p.m.

Although Sidney Peacock, a friend of the petitioner who does not work at eBay, testified that the petitioner returned to work in the

evenings about once per week, this is not consistent with the petitioner's testimony or the testimony of his co-workers. The petitioner's testimony was that he frequently got calls at home at night and on the weekends that required his time from home. This is also consistent with the petitioner's wife's testimony. Brandon Sherman, the petitioner's witness, also testified that the petitioner came back into the office only one to two times per quarter, not the weekly return testified to by Mr. Peacock.

However, the petitioner did put in additional hours regularly from home. The petitioner had an on call schedule rotation of on call responsibilities one week every three weeks (rotating on call with 2 other employees) from July 2003 until February 2005. At that time, he was demoted as eBay manager and on call rotation was increased to 4 and then 5 people, including the petitioner. As a result, his on call duties were lessened although there were some absences of other on call personnel between February 2005 and February 2006. The on call duties resulted in the petitioner receiving calls at home. These calls lasted from 15 minutes to a series of calls over a period of several hours, depending on the nature and severity of the problem. The petitioner also was sometimes required to make calls or send email to other eBay management or to participate in conference ("bridge") calls with eBay staff or management from other teams.

The petitioner also monitored email communication at home. While this was not a

stated requirement of the job, the preponderance of the evidence is that it was necessary for the manager to stay informed of events occurring during the 24 hour eBay operations and was also necessary for the assigned on call person to monitor. While this may not have required monitoring throughout the night as the petitioner did, the email did require his attention while at home, whether he chose to monitor it before going to bed and upon rising or throughout the night as he did.

Although the eWatch team increased in staff under Ms. Dutton, the staff growth reflected the growth of eBay and an increased number of customers and not an overall lessening of staff workloads. The facts relevant to the petitioner's average weekly hours worked are the number of hours the petitioner worked during his daily work schedule and his on call schedule. The preponderance of the evidence is that the petitioner worked a 60 hour week on average until February 2005 when he was replaced as eWatch manager by Susan Dutton. Karlie Kimmerle, the eWatch manager immediately prior to the petitioner, worked 60 or more hours per week. However, she designated only one person to rotate on call weeks with requiring her to be on call every other week, unlike the petitioner who designated two other on call employees so rotated on call every three weeks. Susan Dutton, the eWatch manager assigned to replace the petitioner in February 2005, works 50-55 hours per week although she had a 4, and then 5, person on call rotation so does work on call as often as the petitioner did during

his tenure as manager. In February 2005, the petitioner was demoted to an analyst position on the team and Susan Dutton was made eWatch manager. This change resulted in the petitioner being relieved of some of his management duties and lessening the petitioner's on call rotation. In November 2005, another supervisor was hired who took over more of the petitioner's duties, including some personnel supervision. The undersigned finds the petitioner worked less than 60 hours per week on average after February 2005.

Besides working long hours, the work environment at eBay was very demanding. The company was expanding quickly during the period the petitioner was employed. eBay provides a continuous online auction service and that online environment must be continuously and correctly functioning. This puts significant strain on eBay staff and management to maintain and monitor this online environment which, at the same time, is being expanded to accommodate new services as well as being internally updated and improved. Testimony was uniform on this point: eBay is a fast paced, demanding and constantly changing work environment.

As noted above, in February 2005, the petitioner was demoted from eWatch manager to a business analyst and Susan Dutton was made eWatch manager. The petitioner still retained direct supervisory responsibility for the team. Ms. Dutton was made eWatch manager because of management concern that the petitioner did not have a good work/life balance and that he did not manage his time well.

This was reflected in procedures put in place that required the petitioner to be contacted more frequently than necessary to accomplish eWatch tasks. This began a period where Ms. Dutton closely supervised the petitioner and worked to change team procedures that had been put in place by the petitioner in order to more effectively operate the eWatch function.

The petitioner has filed a discrimination claim against eBay. The petitioner's age discrimination claim is alleged to have occurred in February 2005 when the petitioner was demoted and replaced by Susan Dutton. The first event leading to the petitioner's sexual harassment/discrimination/retaliation is alleged to have occurred in April 2005 and continued until his last week of employment in February 2006.

The petitioner first complained of tinnitus to Dr. McDermott on August 10, 2005 when he was being treated for bronchitis. Dr. McDermott cleaned earwax from the petitioner's ears and suggested he irrigate them on a regular basis. Medical exhibit 19-20.

In November 2005, Jason Hughes began working as the swing shift eWatch supervisor. At that time, Mr. Hughes took over direct supervision of 6 of the employees the petitioner supervised. Mr. Hughes' shift overlapped the petitioner's shift by a couple of hours. Mr. Hughes suggested changes to staff supervision and felt the petitioner needed "development" of his skills related to documentation and technical understand of eBay function.

On November 2, 2005, the petitioner sought treatment with Dr. McDermott for bronchitis and increasing bilateral tinnitus. Dr. McDermott again notes ear wax. Medical exhibit 21-22. The petitioner returned to Dr. McDermott on November 15, 2005 for respiratory infection symptoms but made no further mention of tinnitus. Medical exhibit 23-24.

In December 2005, surveys done by team members of the petitioner's management performance were very low, not even approaching a successful performance level. The petitioner's allegation that the team understood these reviews were of Ms. Dutton and not him is not credible. The reviews had the .petitioner's name on them as the person being reviewed. While there were some questions on the. surveys about upper management, the bulk of the survey questions go to evaluating the employee's direct supervisor. During 2005, even though Ms. Dutton was made manager, staff still reported directly to the petitioner. While some comments were made about Ms. Dutton on these reviews, those comments were passed on to her supervisor for review/evaluation.

Also in December 2005, a website sign on problem arose where eBay members could gain access to other members' accounts. The system problem allowed members to sign in on other members' accounts. The petitioner was on call when the symptoms of this problem arose but hi did not raise it with other teams or upper management ("escalate"). The scale of the problem became apparent two days later and required continuous

work by all the eWatch on call staff over an entire weekend to get the problem fixed. Upper management was concerned that the petitioner had seen-the symptoms of this problem while on call but had not escalated the issue s that it could be dealt with immediately, given the impact and compromise to the eBay website and users.

Ms. Dutton met with the petitioner and informed him he would be placed on a performance improvement plan as the result of the survey results and the failure to recognize the sign on issue. She did not implement the plan in December 2005 because she wanted more detailed information about team members' concerns so she could better set performance goals for the petitioner. Ms Dutton requested the human resources department conduct detailed interviews with the team members to gather this information. Ms. Dutton was not involved in these interviews. The petitioner was aware the team would be interviewed.

In January 2006, Ms. Dutton again reduced the number of employees on the team who were directly supervised by the petitioner. Ms. Dutton had not yet implemented the petitioner's performance improvement plan because she was waiting for additional information from the employee surveys being done by human resources.

On January 23, 2006, the petitioner filed an anonymous ethics hotline complaint against Susan Dutton complaining of sexual harassment. The petitioner filed a second anonymous complaint as

a follow up to the first because he did not believe the first complaint had been acted upon. The petitioner filed a third complaint, this one not anonymous, complaining of a hostile work environment as the result of actions by Ms. Dutton and Wendy Jones. The petitioner filed a fourth complaint against Ms. Dutton related to the petitioner's belief that Ms. Dutton had asked Jason Hughes to monitor him. These complaints were investigated by the human resources department and were found to be either unfounded or related to Ms. Dutton's attempts to improve the petitioner's work performance.

In early February 2006, Jeff Anderson, human resources manager, met with the petitioner and told him he was being placed on a performance improvement plan.

On February 9, 2006, the petitioner sought treatment with Mark Treuhaft, LCSW, because of extreme anxiety and noise in his head that was intensifying. Mr. Treuhaft notes:

> ...he is a manager at ebay and that he feels threatened and intimidated there. . .his boss and other co-workers at ebay are unhelpful in resolving his concerns ...he is being sexually harassed... also experiencing sexual discrimination and retaliation... is extremely fearful of being fired because of his attempt to resolve these issues ... also extremely distressed about the return of his boss in a week, due to her reported history of retaliation and aggression."

Medical exhibit 65.

The petitioner spoke with human resources about the possibility of getting a short term disability leave and vas referred to eBay's third party vendor who handles such requests. The petitioner reported the need for leave was family stress related to his son who has bipolar disorder.

On February 14, 2006, the petitioner reported an escalation of panic, anxiety and depression symptoms to Mr. Treuhaft. Medical exhibit 65-66.

On February 15, 2006, the petitioner complained to Dr. McDermott of worsening tinnitus, stress, poor sleep, vertigo, anxiety and multiple stressors. The petitioner was referred for an ear, nose and throat evaluation. Dr. McDermott also prepared a medical release for anxiety, vertigo and insomnia. Medical exhibit 25-28. The petitioner then went on short term disability.

On February 16, 2006, Dr. Finlayson assessed the petitioner with tinnitus due to stress and sinus congestion for the past few months. Dr. Finlayson noted the petitioner had "much stress recently on job" and that the petitioner was seeing a mental health worker secondary to tinnitus. Medical exhibit 54-55.

Dr. Daniels noted on March 2, 2006 that the petitioner "...reports that he has been unable to work due to severe tinnitus and some anxiety issues-he has been under extra stress at work due to being the victim of sexual harassment-

reports that his tinnitus increased in intensity since these problems at work have happened..." Medical exhibit 76.

The petitioner filed a charge of discrimination against eBay with the Utah Anti-Discrimination and Labor Division on March 3, 2006.

Dr. Caten notes on March 6, 2006 that the petitioner "...reports recently being harassed at work starting 1 year ago. He feels that he has been sexually harassed and is fearful he will lose his job...he reports doing fairly well until 1 year ago when he felt sexually harassed by boss and then punished for it. He now reports that he can't work next to this boss [secondary] to anxiety." Medical exhibit 71-72. On March 21, 2006, Dr. Caton writes that he is treating the petitioner for anxiety and that "[h]e reports a fear of being under the supervision or management of Wendy Jones and Susan Dutton at work and that being in this environment worsens his anxiety." Medical exhibit 75.

On April 7, 2006, Mr. Treuhaft noted the petitioner began "...experiencing relief from his symptoms of panic, anxiety and depression... he learned that he did not have to go back to ebay given the nature of his leaving ie. sexual discrimination and age discrimination, intimidation ... It is my opinion.. .that he exhibits symptoms of post traumatic stress disorder ie. panic, anxiety and depression due to his interaction with the co-workers at ebay." Medical exhibit 67-68.

Dr. McGarrett opined in his summary of medical record that the tinnitus the petitioner suffers from is caused by his work environment stating, "...negative reactions and stress can exacerbate the intensity of a perceived tinnitus." Medical exhibit 86. Dr. Tagge opined that noise is subjectively heard by the petitioner. He goes on to state "...significant tinnitus is often times secondary to a-response of the limbic system and-autonomic nervous system-.: stress-, psychological, and social characteristics are know to important factors in the pathogenesis of tinnitus and the ability to cope with tinnitus..."

The petitioner worked long hours in a fast paced, high pressure environment at eBay as eWatch manager. The petitioner was then demoted and believed he was the victim of age discrimination and sexual harassment while still maintaining supervisory responsibility and working much more than a 40 hour work week on a regular basis. The petitioner was then faced with low supervisory scores from those he supervised and displeasure from upper management with his handling of a system failure, all of which resulted in management placing him on a performance improvement plan because of inadequate performance and faced the possibility of loosing his job. The petitioner suffered extraordinary mental stress as the result of his employment with eBay.

However, it was not until he was demoted in February 2005 and believed that he was the victim of age discrimination and then, in April 2005,

believed he was the ongoing victim of sexual harassment and retaliation, that he exhibited any symptoms of stress related tinnitus. This condition worsened only after eBay management gave the petitioner a negative work evaluation and placed him on a performance improvement plan in February 2006 and also when the petitioner filed complaints of employment discrimination against eBay. Nowhere in the medical records does the petitioner report his source of workplace stress that resulted in tinnitus as being the long hours and demanding work environment of eBay. Further, the petitioner worked in as eBay manager for almost 2 years in that environment without ever having tinnitus symptoms or the need for treatment for stress. Further, the petitioner, in his claim for damages related to his discrimination claim, includes a damage claim related to tinnitus.

The workplace stress that caused the petitioner's tinnitus is the result of good faith employer personnel actions and alleged discrimination.

Because the petitioner's claim fails for this reason, discussion of apportionment for the possible contribution of non-employment stress the petitioner experienced, including the petitioner's bipolar child, the petitioner's health conditions other than tinnitus and his spouse's health conditions need not be addressed.

PRINCIPLES OF LAW

Utah Code § 34A-3-106 outlines the cause of action for occupational disease claims arising as the

result of exposure to mental stress. That provision states:

> (1) Physical, mental, or emotional diseases related to mental stress arising out of and in the course of employment shall be compensable under this chapter only when there is a sufficient legal and medical causal connection between the employee's disease and employment.
> (2)(a) Legal causation requires-proof of extraordinary mental stress arising predominantly and directly from employment.
> (b) The extraordinary nature of the alleged mental stress is judged according to an objective standard in comparison with contemporary national employment and nonemployment life.
> (3) Medical causation requires proof that the physical, mental, or emotional disease was medically caused by the mental stress that is the legal cause of the physical, mental, or emotional disease.

In Wood v. Eastern Utah Broadcasting, Case No. 01-0208 (issued 3/31/06), the Commission Appeals Board outlined the legal causation standard that must be met in occupational disease mental stress claims. The first step is to "...identify the `mental stress arising predominately and directly from employment.'" Then a comparison is made between the stress experienced by the employee and stress that the general public endures in their employment and nonemployment life to determine

whether the level experienced by the employee is "extraordinary." The Appeals Board in Wood, infra, noted "...the proper comparison is not with either the most stressful or the least stressful situations encountered in life, but rather, the broader range that are `generally' experienced."

Once the mental stress related to employment is identified, a determination must then be made under Utah Code § 34A-3-106(4) and (5) whether the stress from employment is related to good faith employer personnel actions or alleged discrimination. Mental stress as the result of such conditions cannot form the basis of a mental stress claim. Those provisions of the Code state:

> (4) Good faith employer personnel actions including disciplinary actions, work evaluations, job transfers, layoffs, demotions, promotions, terminations, or retirements, may not form the basis of compensable mental stress claims under this chapter.
> (5) Alleged discrimination, harassment, or unfair labor practices otherwise actionable at law may not form the basis of compensable mental stress claims under this chapter.

If the mental stress is found to arise predominately and directly from employment and is not the result of good faith employer personnel actions or alleged discrimination then a determination as to whether there is a medical causal connection between the condition alleged and the mental stress.

If such medical causal connection exists, then possible non-employment sources of stress would be analyzed as part of the apportionment required by Utah Code § 34A-3-110 since stress is something an employee may have substantial exposure to outside employment and to which the general public is commonly exposed.

CONCLUSIONS OF LAW

The workplace stress experienced by the petitioner while employed at Ebay is not the legal cause of his tinnitus.

The petitioner's Application for Hearing is dismissed with prejudice.

ORDER

IT IS THEREFORE ORDERED that the petitioner's application for hearing is dismissed with prejudice.

DATED this 29th day of December, 2006

/s/
Debbie L. Hann
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

A party aggrieved by the decision may file a Motion for Review with the Adjudication Division of the Utah Labor Commission. The Motion for

Review must set forth the specific basis for review and must be received by the Commission within 30 days from the date this decision is signed. Other parties may then submit their responses to the Motion for Review within 20 days of the date of the Motion for Review.

Any party may request that the Appeals Board of the Utah Labor Commission conduct the foregoing review. Such request must be included in the party's Motion for Review or its response. If none of the parties specifically request review by the Appeals Board, the review will be conducted by the Utah Labor Commission.

APPENDIX F

NOTICE OF RIGHT TO SUE *(ISSUED ON REQUEST)*

Emmanuel D. Kepse
158 N 920 W
Orem, UT 84057

From: Phoenix District Office - 540
3300 North Central Ave
Suite 690
Phoenix, AZ 85012

RECEIVED
JUL 03 2006
SMITH HARTVIGSEN

☐ *On behalf of person(s) aggrieved whose identity is CONFIDENTIAL (29 CFR § 1601.7(a))*

ge No.	EEOC Representative	Telephone No.
2006-00291	Cherrie Y. Martin, State & Local Coordinator	(602) 640-5084

(See also the additional information enclosed with this form.)

:E TO THE PERSON AGGRIEVED:

VII of the Civil Rights Act of 1964 and/or the Americans with Disabilities Act (ADA): This is your Notice of Right to Sue, issue r Title VII and/or the ADA based on the above-numbered charge. It has been issued at your request. Your lawsuit under Title VII DA must be filed in federal or state court **WITHIN 90 DAYS** of your receipt of this Notice or your right to sue based on this charg e lost. (The time limit for filing suit based on a state claim may be different.)

☐ More than 180 days have passed since the filing of this charge.

☐ Less than 180 days have passed since the filing of this charge, but I have determined that it is unlikely that the EEOC will be able to complete its administrative processing within 180 days from the filing of the charge.

☒ The EEOC is terminating its processing of this charge.

☐ The EEOC will continue to process this charge.

Discrimination in Employment Act (ADEA): You may sue under the ADEA at any time from 60 days after the charge was filed 90 days after you receive notice that we have completed action on the charge. In this regard, the paragraph marked below ee to your case:

☒ The EEOC is closing your case. Therefore, your lawsuit under the ADEA must be filed in federal or state court **WITHIN 90 DAYS** of your receipt of this Notice. Otherwise, your right to sue based on the above-numbered charge will be lost.

☐ The EEOC is continuing its handling of your ADEA case. However, if 60 days have passed since the filing of your charge you may file suit in federal or state court under the ADEA at this time.

d Pay Act (EPA): You already have the right to sue under the EPA (filing an EEOC charge is not required.) EPA suits must be brougl leral or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that back pay due fo violations that occurred **more than 2 years (3 years)** before you file suit may not be collectible.

r file suit based on this charge, please send a copy of your court complaint to this office.

On behalf of the Commission

Chester V. Bailey

JUN 29 2006

nure(s)

Chester V. Bailey,
District Director

(Date Mailed)

EBAY INC
173 W Election Road
Draper, UT 84020

D. Scott Crook
215 s state st #650
Salt Lake City, UT 84111

BEST AVAILABLE COPY

APPENDIX G

- Personal Profile
- Personal Data
- Job and Pay Info
- Organizational Info
- US Benefits
- Your Benefits Resources
- eBay History
- Job Progression
- Pay History
- Bonus History
- Additional Bonus History
- Differential History
- Performance History
- Training History
- Sabbatical History
- Stock History
- Forms
- Sabbatical Request
- Sabbatical Cancel
- View/Update Address
- View/Update Emergency Contact

Employee History

Employee Name: Kepas,Emmanuel
Personnel No: 00206560

Print

Job Progression: Updated as of 25-Jan-2006

Effective Date	Reason	Job Code	Job Title	Salary Grade
01-Jul-2005	Job Change	21604101	Manager, Customer Support 1	E25SL
11-Feb-2005	Mgr, Job	21260094	Business Sys Analyst 4	T25SL
21-Jul-2003	New Requisition	21604102	Manager, Customer Support 2	E26SL

Pay History: Updated as of 25-Jan-2006

Annual Rate of Increase: 2.00%

Effective Date	Reason	Work Week %	Annual Salary	Currency	Change Amount	Change %
01-Apr-2005	Annual Review	100.00	81,816.75	USD	1,604.25	2.00
01-Mar-2004	Annual Review	100.00	80,212.50	USD	2,712.50	3.50
21-Jul-2003	New Hire	100.00	77,500.00	USD		

Bonus History: Updated as of 25-Jan-2006

Effective Date	Name	Target Bonus %	Payout %	Target Payout Amount	Payout Amount	Currency	Individual Performance Score	Financial Funding Level
30-Sep-2005	EIP	10.00	10.30	2,202.76	2,268.84	USD	97	109.00
30-Jun-2005	EIP	10.00	12.75	2,194.13	2,797.51	USD	105	150.00
31-Mar-2005	EIP	10.00	12.50	1,851.06	2,313.83	USD	100	150.00
31-Dec-2004	MIP	15.00	0	3,007.97	0.00	USD	91	0
30-Sep-2004	MIP	15.00	18.53	2,276.59	3,410.01	USD	97	150.00
30-Jun-2004	MIP	15.00	18.75	3,239.36	4,049.20	USD	100	150.00
31-Mar-2004	MIP	15.00	18.83	2,698.34	3,387.32	USD	101	150.00
31-Dec-2003	MIP	15.00	18.75	3,129.81	3,912.26	USD	100	150.00

KE 00546

APPENDIX H

Chapter 7: Employee Complaints of Susan Dutton's Harassment

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BEFORE THE AMERICAN ARBITRATION ASSOCIATION

EMMANUEL D KEPAS, Claimant, v EBAY, INC., a Delaware Corporation Respondent.	**DECLARATION OF CLINTON ERICSON** Case No. 77 460 00465 06

STATE OF UTAH }
SALT LAKE COUNTY }

1 I am a resident of Sandy, Utah, over the age of 18; and provide this affidavit based on my own personal knowledge and expertise.

2 I worked for eBay for a period of seven years. I was employed in eWatch during the entire time that Emmanuel Kepas was also employed there. I am no longer employed by eBay, my last day of work being June 13, 2007

3. On July 12, 2007, I gave 3-weeks notice that I would be terminating my employment to take another job. The next day I was asked to leave and given a severance.

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Before I left my supervisor, Jason Hughes told me that Susan wanted me "gone" and that I needed to turn in my laptop immediately and most likely it would be formatted as soon as it was turned into the IT department. I requested to be able to save some personal files from the computer Mr Hughes permitted me a few minutes to do so I copied as many of my personal files as I could and placed them on a portable hard drive.

4. During the time that I was employed at eBay, for a period from mid 2004 until February 2005, Mr Kepas was the eWatch Manager and my direct supervisor In February 2005, Mr. Kepas was demoted and Susan Dutton was employed as a manager in the eWatch Department and was either my direct supervisor or the supervisor of my direct supervisor until I left eBay

5. After Mr Kepas was demoted, I often attended one-on-one meetings with Ms. Dutton wherein she was supposed to discuss my performance with me.

6. Ms. Dutton frequently spoke about her boyfriend during these one-on-one sessions During one of these sessions, she told me that her boyfriend had been on the Internet looking at porn and she suspected that he was sleeping with other women She also told me that she broke up with her boyfriend because of this and that she had been invited to appear on the Judge Judy court television show to "rake him over the coals".

7. In early January 2006, Ms. Dutton came onto the eWatch floor and declared in a voice loud enough for the entire team to hear that she had "hurt her back in a circle jerk" that morning. When she said it, she laughed with an expression on her face from which I inferred that she clearly understood what the meaning of the term "circle jerk" was. After her initial declaration, she then explained that she had hurt it in an exercise called a circle jerk that she had participated in in an exercise program that was called Bootcamp. From her tone,

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expression, and demeanor, it was clear to me that Ms Dutton knew that circle jerk had a sexual connotation and that she intended to shock those who heard her first sentence

8. Ms Dutton often wore suggestive clothing to work. In fact, on at least two occasions, I witnessed Human Resources coming over to talk to her and afterwards, Susan left work and returned in different clothing.

9. Ms. Dutton frequently spoke about her breast implants and told me how her son had told her she was all "fake". Fake hair, fake face, fake breasts and that everything about her was fake. I didn't feel this was appropriate conversation for the workplace.

10. Ms. Dutton also frequently told me about her son's legal problems and that he had been arrested for drugs and she had to keep leaving work to "bail him out" or attend court or pay fines for him so he would stay out of jail She also told me that she kicked him out of her house because he had friends over doing drugs and that he had impregnated his girlfriend.

11. After Mr Kepas took leave from work, I spoke with Jason Hughes about the circumstances of his leaving. In one conversation, Mr. Hughes told me that just prior to Mr. Kepas' leaving, Susan Dutton told him to watch what Mr. Kepas was doing and report back to her on his activities

12. Several months after Mr. Kepas was no longer working at eWatch, I was asked to give an interview with the lawyer representing eBay in the claims brought by Mr. Kepas against eBay The day before I was scheduled to speak with the lawyer, Ms. Dutton gave me a $500 eBay check and said, "I want you to be open and honest with the lawyer " Her demeanor and attitude in giving me the check suggested that she wanted me to speak favorably of her and to shade my answers. Additionally, she did not identify the basis for the $500 check although she said it was for a bonus. I believed that Ms. Dutton was attempting to bribe me to testify in

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her favor since she would normally present any kind of performance bonuses in a team meeting or announce it to the team and it was clear she wanted to keep this low-key.

13. I spoke with the lawyer. During my conversation with the lawyer, I explained that I would testify that Ms. Dutton had, in fact, been harassing me and I wouldn't be any help for their side of the case. The next day Ms. Dutton pulled me into a conference room and told me that she "had received feedback from Jason Hughes" and that she would have to counsel me. On a later occasion, she told me, in a during my 2007 annual review of my performance that she was marking me down on my eBay Behaviors ratings because I "went to HR" about her treatment of me. When I confronted her about that statement, she said no one would believe me.

14. I reported my concerns to Janna Heitland in Human Resources on several occasions. I interviewed with Ms. Heitland in the HR offices regarding the complaints, but there was never any reprieve from the harassment I was receiving, rather it got worse. After my annual review with Susan, I met with Ms. Heitland 10 minutes later and told her about the retaliation statement that Susan had made minutes earlier. Ms. Heitland appeared to brush it off. When I confronted Ms. Heitland that I didn't think anything was being done, she told me that she couldn't tell me what had been done, but the resolution from HR was always that everything Ms. Dutton had done was within her managerial authority and on one occasion, she suggested that I was becoming paranoid.

15. Ms. Dutton always kept my "personnel file" locked up and wouldn't let anyone look at it, including me. When I suggested to Ms. Heitland that she wouldn't let me look at my own file and I felt I had a right to view the contents of it, Ms. Dutton showed me the notes she had taken during our last one-on-one session. The notes were not handwritten as she had taken

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them, but typed up. The contents of these "notes" were half-truths and contained contradictory statements to what was actually discussed. She never turned my file over to Jason Hughes once HR removed me from her direct supervision nor would she allow Jason to view the contents

16. Ms. Dutton often made contradictory statements either via email or "her notes". On several occasions, I was following instructions that were mutually agreed upon and she would then change the agreement at a later time during a counseling session. Her notes always trumped mine when I would report the inconsistency to Janna Heitland in HR. On one documented occasion, Ms. Dutton had instructed me via email to contact Jason Hughes in her absence Ms. Dutton was in court with her son one Friday when there was a departmental Christmas Party that was supposed to last the entire afternoon. The party got out early and I called Jason Hughes, asked if Susan was there, he told me no I then told him the Christmas party had just concluded and asked him if he needed me to come back into the office. He told me no, everything was under control. The next Monday I was counseled by Susan for not calling her to tell me the party was over and that she had expected me to call her even though she was out of the office that afternoon. I forwarded her email thread about the incident to Janna Heitland in HR and the next day, Susan was upset because I "kept going to HR." There were several occasions where I asked for Mr. Hughes to be present in our one-on-ones so I could bring up instances with a witness and she would always change her demeanor and tell me I was welcome to contact HR Then became visibly upset when I told her that I had an appointment with HR just 15 minutes after the current discussion On several occasions, including where Jason was present, she would badger me on issues until I was too upset to even speak.

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17. Jason Hughes confirmed that she was indeed trying to fire me but he was not allowing her to "make up stuff" about me to do so.

18. When I was offered a severance package by Jason Hughes on Wednesday, June 13, 2007, Susan had left that day to travel to the eBay Convention and had told Jason that she "wanted me gone" by the time she got back from eBay Live in Boston and I was NOT to be rehireable. I initially declined the offer because I had several of my job responsibilities I wanted to ensure were turned over properly before my departure and I had given notice that my last day would be June 30, 2007. Jason told me it would just make things worse and they would handle it and I should leave Under the provisions of my severance, I was to receive full pay and benefits through the end of the month as well as my 2nd Quarter bonus and I would also retain all accrued PTO to be cashed out upon severance. I spoke with Jason later and he informed me that Susan tried to lower my quarterly scores to a 2 in order to not allow me to be rehireable at eBay and also lose my quarterly bonus The reason for this was apparently "dumping my job responsibilities". Jason told me that he told her she couldn't do that and was not going to allow it. I was not officially terminated until July 5, 2007 and I believe Susan was holding off on this to either find a way to terminate me under unfavorable circumstances or to simply delay my final severance pay check as she knew I needed the money

I DECLARE UNDER CRIMINAL PENALTY OF THE STATE OF UTAH THAT THE FOREGOING IS TRUE AND CORRECT.

Executed this 3rd day of May, 2008.

Clinton Ericson

APPENDIX I

CD: Yes Five days before I was demoted, Wendy decided to confide in me that a person she was dating got held up in customs in Germany. I think it is wrong that eBay used its time and money and resources to get Wendy's boyfriend out of jail.

Q: Were you with anyone else when Wendy shared this story?

CD: No

CD: another example, a few days before the last earnings announcement, Henry Gomez told an employee to dump the stock because the stock was going down..and as you know that is what happened It was up to like 40 and is now down to about 33

Q: Who told you this?

CD: It was another employee. I cannot tell you who.

CD: Another example: Wendy told me that when we did the big special stock grant in September, that Wendy got all of her stock refreshed at that time. I don't think it is appropriate for me to know this.

Q: Were you with anyone else when Wendy shared this?

CD: No it was just me.

CD: I also know of an employee who had sexual relations with Bill Cobb. Bill Cobb knows that I know. This is why my career is being negatively impacted.

Q: Who is the employee?

CD: I cannot tell you now, but I know who it is.

CD: All of these things that people have told me ..that if they were to get out would be reflected poorly for eBay.

Q: When you say you have been demoted, what does this mean?

CD: Demotion means changing my reporting relationship from a VP to someone the same level. It is clear to me that many people would like to see me leave either involuntarily by putting me into this so I would be managed out or make it so that I would be inclined to say that I am leaving (the company)

Q: Who are many people?

CD: Wendy, Bill Cobb, Tim Paine

APPENDIX J

ARBITRATION AGREEMENT

This Arbitration Agreement ("Agreement") is made as of the date signed below by and between /s/ (Emmanuel Kepas) ("Employee") and eBay Inc. ("Employer" or "Company").

The parties to this Agreement agree to arbitrate any dispute, demand, claim, or controversy ("claim") they may have against each other, including their current and former agents, owners, officers, directors, or employees, which arises from the employment relationship between Employee and Employer or the termination thereof. Claims covered by this Agreement include, but are not limited to, claims of employment discrimination and harassment under Title VII of the Civil Rights Act, as amended, the California Fair Employment & Housing Act, the Civil Rights Act of 1991, the Older Workers' Benefit Protection Act, the Employee Retirement and Income Security Act, the Family and Medical Leave Act, the California Family Rights Act, the Age Discrimination in Employment Act, as amended, the Americans with Disabilities Act, 42 UB.C. section 1981, the Employment Retirement Income Security Act, the Fair Labor Standards Act any claims arising under the California Labor Code, the California Civil Code, the California Constitution, breach of employment contract or the implied covenant of good faith and fair dealing, express or implied; wrongful termination in violation of public policy, and all other claims for wrongful termination and constructive discharge or tortious conduct

(whether intentional or negligent) including but not limited to defamation, misrepresentation, negligence, negligent investigation, negligent hiring supervision or retention, assault and battery, false imprisonment fraud, infliction of emotional distress; invasion of privacy, any and all claims relating to employment termination, employment discrimination, harassment or retaliation, claims related to salary, bonuses, commissions, stock, stock options, or any other ownership interests in the Company, vacation or other time-off pay, fringe benefits, expense reimbursements, severance pay, claims for wages, hours, benefits, and compensation, but excluding claims for workers' compensation benefits to remedy work related injury or illness and unemployment compensation benefits.

The parties agree that any claims that either party has that arise out of the Employee Proprietary Information and Inventions Agreement are specifically excluded from this Agreement. This includes, for example and without limiting the generality of the foregoing exclusion, claims by the Company that you have disclosed or misappropriated the Company's trade secrets and/or claims by you that you are the rightful owner of an invention.

The arbitration shall be conducted in Santa Clam County by a neutral arbitrator in accordance with the roles issued by the American Arbitration Association (AAA) for resolution of employment disputes, wherever this Agreement is silent on the arbitration procedure. The Employer will pay the arbitrator's fee for the proceeding, as well as

any room or other charges by AAA. Either party may file pre-hearing motions directed at the legal sufficiency of a claim of defense equivalent to a demurrer or summary judgment prior to the arbitration hearing. The parties may conduct adequate pre-arbitration discovery as determined by the arbitrator.

The arbitrator will issue a detailed written decision and award, resolving the dispute. The arbitrator's written opinion and award shall decide all issues submitted and set forth the legal principle(s) supporting each part of the opinion.

The decision or award of the arbitrator shall be final and binding upon the parties. The arbitrator shall have the power to award any type of legal or equitable relief that would be available in a court of competent jurisdiction including, but not limited to, the costs of arbitration, attorneys' fees and punitive damages when such damages and fees are available under the applicable statute and/or judicial authority. Any arbitral award maybe entered as a judgment or order in any court of competent jurisdiction. The parties agree that any relief or recovery to which they are entitled arising out of the employment relationship or cessation thereof shall be limited to that awarded by the arbitrator.

Nothing in this Agreement precludes Employee from filing a charge or from participating in an administrative investigation of a charge before any appropriate government agency.

The parties further agree, to file any demand for arbitration within applicable statute of limitations for the asserted claims. Failure to demand arbitration within this prescribed time period shall result in waiver of said claims.

Neither the terms nor the conditions described in this Agreement are intended to create a contract of employment for a specific duration of time or to limit the circumstances under which the parties' employment relationship way be terminated. Since employment with the Employer is voluntarily entered into, Employee is free to resign at any time. Similarly, the Employer may terminate the employment relationship without cause or advanced notice at any time.

This Agreement shall be governed by and shall be interpreted in accordance with the laws of the State of California. The terms of this Agreement shall not be orally modified. This Agreement can be modified only by a written document signed by eBay's VP of Human Resources and the Employee.

A court or other entity construing this Agreement should administer, modify, or interpret it to the extent and such manner as to render it enforceable.

I understand that I would not be hired by the Employer if I did not sign this Agreement. I have signed it in consideration of my employment by the Employer. I have been advised of my right to consult with counsel regarding this Agreement. **I ALSO UNDERSTAND THAT BY ENTERING**

INTO THIS AGREEMENT, I AM WAIVING ANY RIGHT TO A TRIAL BY JURY.

EMPLOYEE	EMPLOYER
/s/ (Emmanuel Kepas)	/s/ (Arizana Lugan)
11/7/03	11/14/03
Emmanuel D. Kepas	Arizana Lugan/HR